Sup. Ct. # 85443

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

CARMAN DECK,

Appellant.

Appeal to the Missouri Supreme Court
from the Circuit Court of Jefferson County, Missouri,
23rd Judicial Circuit, Division II
The Honorable Gary P. Kramer, Judge

APPELLANT'S STATEMENT, BRIEF, AND ARGUMENT

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JURISDICTIONAL STATEMENT

In 1996, the State charged Appellant Carman Deck with two counts of first-degree murder, §565.020, for killing James and Zelma Long.[1] In the direct appeal, this Court affirmed Mr. Deck's convictions and sentences, State v. Deck, 994 S.W.2d 527 (Mo.banc 1999). In the appeal from the denial of postconviction relief, however, this Court remanded for a new sentencing trial, Deck v. State, 68 S.W.3d 418 (Mo.banc 2002). On retrial, the jury again recommended death, and Judge Kramer imposed two death sentences. Notice of appeal was timely filed. This Court has exclusive jurisdiction of the appeal. Mo.Const., Art. V, §3.

[1] All statutory references are to the Revised Missouri Statutes, 2000.

STATEMENT OF FACTS[2]

Carman Deck's mother, Kathy, was sixteen and unwed when she became pregnant with Carman (Tr.480,482).[3] Rejected by her own mother, whom she had not lived with for years, Kathy had no option but to remain with the baby's father, Carman Deck, Sr. (Pete) (Tr.482-83). Kathy herself had been abused sexually, mentally, and physically from a very young age (Tr.481).

Kathy was unable to provide even the most basic parenting needs for Carman (Tr.483-84). Her main interest was partying, not caring for a baby (Tr.484,486). Carman's mother "liked to get out and flaunt it, run around with

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[2] The Record on Appeal consists of a three-volume trial transcript (Tr.), a legal file (L.F.), a supplemental legal file (Supp.L.F.), and relevant trial exhibits. This Court has taken judicial notice of the transcript and legal file from the prior direct appeal, SC# 80821, and those shall be referenced as transcript (1st Tr.) and legal file (1st L.F.). Counsel has spoken with the prosecutor and anticipates filing a stipulation, agreed to by the prosecutor, to the content of a videotaped deposition that was played to the jury in lieu of in-court testimony by Michael Deck (Tr.454). The deposition transcript will be filed along with the stipulation and will be referenced (M.D.Depo.).

[3] During the Statement of Facts, the brief will refer to members of the Deck family by first name to avoid confusion.

other men. She never was good with the kids" (Tr.467). She was never at home (Tr.467).

In addition to being left alone, Carman often went without food (Tr.468,484-85). Once, as an infant, he was so dehydrated from not being given food or liquids that hospitalization was required (Tr.484). Kathy could not keep formula in the house, because there was no refrigerator (Tr.484). A paternal uncle and his wife tried to help out, by bringing over-the-counter remedies to treat Carman and bringing formula on a daily basis, but Kathy "took no part in that" (Tr.484).

Carman also was deprived of affection (Tr.501). He "always wanted to hug" other relatives, something he never got from his mother (Tr.501).

Pete had even less ability to parent Carman and preferred to remain estranged from his child (Tr.484). He would leave money that was supposed to be for Carman, but never made the effort to ensure that the money actually went to feed or clothe the child (Tr.485). Pete and Kathy often went out at night to bars and left Carman by himself (Tr.468,485).

Kathy punished Carman severely. Once, when Carman was two or three, she whipped him hard enough to raise welts, for making too much noise while playing (Tr.497,512). Afterwards, Kathy forced him to sit in a corner for hours, and if he so much as whimpered, she cursed and screamed at him (Tr.497,512).

Kathy and Pete had three more children – Tonia, who was three years younger than Carman; Latisha, who was about five years younger than Carman;

and Michael, who was about seven years younger (Tr.485-86). Latisha is mentally retarded (Tr.498).

Even with four children at home, Kathy was never there, but instead, "out partying" (Tr.467,486; M.D.Depo.8). From about age five or six, Carman was placed in charge of the other children and took on the role of mother (Tr.485-86; M.D.Depo.8). He would gather whatever food was available for them to eat – perhaps a stick of butter or dry dog food (Tr.487,506). At times, he stole food so they could eat (M.D.Depo.8). Carman would clothe and clean his brother and sisters (Tr.487-88). The children would have to wear the same clothes – even the same diapers – for days (Tr.488). Carman was the primary caregiver for the children until he was in late elementary school, when a mentally retarded uncle sometimes was left to care for them (Tr.468,485,507).

Kathy's sister would occasionally visit the apartment (Tr.460). Kathy would not be home, and the children wouldn't know where she was (Tr.460). There would be nothing in the refrigerator for the children to eat (Tr.460). The children would either not be dressed at all or would be wearing dirty, shabby clothing (Tr.460). Typically, the infants had no diapers, or the same diaper had been worn for days (Tr.461,488).

When Carman was about seven years old, he had two pet dogs (Tr.498). Pete told him that he would have to choose between the two (Tr.498). After Carman chose, Pete shot the other dog, who was possibly rabid, right in front of Carman (Tr.498).

On occasions "too numerous to count," Kathy would bring men home from bars (Tr.488). In front of the children, they would get naked and engage in "sexual activity" (Tr.488). Carman was seven or eight years old (Tr.520).

When Carman was about ten, Kathy and Pete ended their already rocky relationship (Tr.489). Kathy was left to care for the four children by herself, and money was very tight (Tr.460).

Child welfare agencies became involved when Carman was around nine or ten (Tr.490). Kathy had left with a truck driver for three days and had left the children alone, filthy, and without food (Tr.461,468-69,490). Carman "tried to be brave, you know. You could tell that he was – 'cause he couldn't figure out where his mom was 'cause he didn't know" (Tr.469). Pete picked up the children from the sheriff's office and took them to his brother Norman's house for Thanksgiving dinner (Tr.461,490). The children were dirty and hadn't eaten in days (Tr.455; M.D.Depo.9-10). Michael was "starving to death" (Tr.469). He was so hungry that he wolfed down his food, threw it up on his plate, and then tried to re-eat it (Tr.456,469,490; M.D.Depo.9-10).

When Carman was around twelve or thirteen, Pete took the kids in (Tr.493). Pete was married to Marietta, a very severe alcoholic (Tr.493). Marietta was "very, very, very mean" (M.D.Depo.13). She didn't like the children, whom she considered "extra baggage" (M.D.Depo.14). She fed them only cold hotdogs (M.D.Depo.13). Marietta would make the children kneel on broomsticks in the corner, and she would slap them, spank them, or pull their hair (M.D.Depo.13-14).

Marietta was malicious in punishing the children, especially Carman (Tr.493). One time, the children were told to sit in the car and were not allowed to leave to use the bathroom (Tr.494). After several hours, Carman had a bowel movement on himself (Tr.494; M.D.Depo.12-13). When Marietta eventually returned, she took Carman's soiled underwear and smeared it onto his face (Tr.472,494; M.D.Depo.12-13). She made Carman leave it there, allowing it to cake and dry (Tr.494). All that could be seen through the feces were Carman's eyes (Tr.472). Meanwhile, Marietta verbally abused Carman, telling him how embarrassed he should be of himself (Tr.494). She photographed Carman and told him she would show everyone the picture and tell everyone what he had done (Tr.470,494). She did in fact show the photograph to other people (Tr.470,472).

One evening, Marietta and Pete argued about the children (M.D.Depo.14). Marietta gave Pete an ultimatum – he would have to choose between her and the kids (M.D.Depo.14). The next day, Carman was shipped back to live with Kathy, and the three other kids were sent back to Uncle Norman's house (Tr.462-63,469,491; M.D.Depo.14).

Carman began a long string of foster home placements, interrupted by brief stints with his mother (Tr.462-63,469,491). Kathy would come and get Carman from a foster home, but then abandon him and give him back (Tr.491).

At age fourteen or fifteen, Carman spent about a year in the foster home of Reverend Major Puckett (Tr.495,526,528,530-31). Carman did well and fit in "just like he was born there" (Tr.495,528). Reverend Puckett described Carman as

a very likable boy who never argued and always did his chores (Tr.495,526, 528). Carman treated his blind foster mother like she was his own mother:

> He would read the instructions off the cans to her [when she'd go to cook] and help her in the kitchen and he just tried to take all the work off of her that he could. He was like a son to her.

(Tr.529). Reverend Puckett didn't "ever remember him crossing me in any way, shape or form, not one time" (Tr.531). One time, Carman messed up at school, but never again (Tr.531). Carman often talked about the unhappiness he experienced when he lived at home (Tr.530).

Reverend Puckett wanted to adopt Carman, but Carman returned to his mother (Tr.495,530). Kathy came, exercised her parental rights, and Carman had to leave (Tr.496). Carman argued that he should be able to stay, since making him leave was "killing me on the inside" (Tr.530). Carman said, "leave me, don't take me, and [the social workers] said, we don't give a damn how you feel, you're gonna go anyway" (Tr.530).

Meanwhile, Carman's three siblings lived for seven years with his Uncle Norman and Aunt Elvena (M.D.Depo.15). Life at Uncle Norman's house was a lot better than what they were used to (M.D.Depo.15). Uncle Norman kept Michael out of trouble and taught him right from wrong (M.D.Depo.15).

When Carman was in his mid-teen years, Kathy decided to reunite the family to make amends for what she'd done wrong in the past (M.D.Depo.16). The four children lived together for the first time in years (M.D.Depo.16).

Michael “really enjoyed” being with Carman, whom he had seen only at birthdays and holidays for the past seven years (M.D.Depo.16,19).

When Carman was sixteen or seventeen, he lived in DeSoto and had a friend named Michael Behr (Tr.353). Michael and Carman came up with a plan to get money from Michael’s grandparents, James and Zelma Long, so the two friends could buy a car (Tr.353-54). They went to the Long house, and Michael went into the bedroom, opened the safe, and took money (Tr.354). Michael and Carman did this three or four times (Tr.355,357). They eventually got caught, and the two went their separate ways (Tr.355).

Kathy had a habit of stealing, and she taught Carman to steal (Tr.464). Starting in 1985, he picked up a number of convictions for burglary and stealing (Tr.402-406). In prison, at about age eighteen, Carman was the victim of a gang rape, an incident that really affected him (Tr.500). That year, he also was convicted of aiding an escape and was given a three-year sentence (Tr.404).

When Carman was out of prison, he spent “quality time” with his young niece, Michael’s daughter Amber (M.D.Depo.17). For a good year of Amber’s first years of life, Carman was always buying her things, taking her places, and generally treating her “like a princess” (M.D.Depo.17). Carman lived across the street from Michael and Amber and was very accessible (M.D.Depo.22).

Facts of the Crime

On Monday, July 8, 1996, at about 7:30 p.m., the Arnold Police Department notified the Jefferson County Sheriff's Department that a man had reported that a robbery and possible murder would take place in rural DeSoto involving an elderly man (Tr.280-81,284). Deputy Sheriff Donna Thomas spoke with the man, Charles Hill, who stated that he had received the information from his former girlfriend, Tonia Cummings (Tr.282).[4] He identified Tonia and her brother Carman Deck as the people who would be committing the crimes (Tr.282).

The Jefferson County Sheriff's Department launched a door-to-door investigation in rural DeSoto and also tried to locate Tonia and Carman (Tr.282,284, 309). They learned that Tonia had an apartment in St. Louis County and that Carman stayed there (Tr.282-83). A police officer from St. Louis County was asked to try to locate them at the apartment (Tr.283,289).

When the officer arrived, he looked for Tonia's car but did not see it, so he parked and waited (Tr.289-90). At about 11:00 p.m., the car drove past the

[4] Defense counsel objected to Deputy Thomas' hearsay testimony that Mr. Hill told her that Tonia told him that she and Carman would be committing a robbery and possible murder (Tr.281-82). The court summarily overruled the objection (Tr.281). The court did not instruct the jury how it may consider the evidence. At the first trial, the court had granted defense counsel's hearsay objection to the evidence (1st Tr.554-55).

officer, turned off its headlights and pulled into a parking spot (Tr.290). The officer approached the car and ordered Carman out (Tr.291). The officer found a loaded gun under the front passenger seat (Tr.300).

Carman was placed under arrest in St. Louis County for carrying a concealed weapon (Tr.303). He was wearing a black fanny pack, containing his driver's license and $242 in dollar bills (Tr.302-303,307). A decorative tin was on the floorboard containing $31.88 in coins (Tr.304,342-45).

At about midnight, a detective came to take Carman from St. Louis County to Jefferson County (Tr.305,348-49). He also retrieved Carman's personal property and the gun (Tr.349). As the detective counted the cash taken from him, Carman commented that some of the cash had been his already (Tr.351-52).

Carman willingly spoke with the police (Tr.429-30). Although he admitted he had been in Jefferson County that evening, he denied involvement in the crimes (Tr.431). About four hours later, Carman stated that he knew that his mother's boyfriend, James Boliek, had committed the crimes (Tr.432). He explained that afterwards, Boliek gave him the gun and the can of coins (Tr.432). He gave the police the location of the house involved (Tr.436-37).

An officer went to that location and found the front door open (Tr.311-13). Inside, he found James and Zelma Long laying face down on their bed (Tr.317). Both had died as the result of contact gunshot wounds to the head (Tr.364-65,367).

The bedroom closet contained an open safe, and papers were scattered in front (Tr.320-21). Three shell casings were found on the floor (Tr.327-29).

Immediately, the police investigated Boliek (Tr.434). They spoke with him, with Carman's mother, and with Boliek's neighbor (Tr. 434-35). The police concluded that Boliek had an alibi for the time period in question (Tr.434).

Confronted with Boliek's alibi, Carman confessed to the crimes after expressing concern for his sister (Tr.436-37;Ex.69). He admitted that he and Boliek had talked about getting money from the Long's house for three to four weeks (Tr.440,450;Ex.69). Carman knew that the Longs kept money in their house from fifteen years earlier when he and the Longs' grandson took large amounts of money from the bedroom safe (Tr.439;Ex.69).

Carman and Boliek drove down and looked at the Longs' house three or four times (Tr.440;Ex.69). They agreed to come back on a Sunday when the Longs would be at church, but each Sunday, something would deter them (Tr.439; Ex.69). Boliek needed money for a trip to Oklahoma with Carman's mother, and the date for the trip was rapidly approaching (Ex.69). A Sunday burglary was no longer an option (Ex.69). The plan changed from a burglary to a burglary or a robbery (Ex.69).

The two agreed that Boliek would let Carman use one of his guns in the burglary or robbery in exchange for a cut of the proceeds (Ex.69). At about 6:30 or 7:30, Carman and Tonia drove to DeSoto (Tr. 440;Ex.69). When it was dark enough, around 9:00, they pulled into the Longs' driveway (Ex.69). They both got

out of the car, and Carman knocked on the door (Ex.69). When Mrs. Long answered, Carman asked for directions (Tr.440;Ex.69). Mrs. Long opened the door and let them in (Tr.440;Ex.69).

Mrs. Long gave directions, while Mr. Long wrote them down (Tr.440; Ex.69). As Mr. Long was writing the directions, Carman used the bathroom (Tr.441;Ex.69). He then got the directions and headed to the door (Ex.69). He was nervous and scared (Ex.69). He pulled the gun from where it had been hidden in his pants, pointed it at the Longs, and ordered them to lay on their bed (Tr.441; Ex.69). Carman told Mr. Long to open the safe, but Mr. Long stated that he did not know the combination (Tr.441;Ex.69). Mrs. Long said she knew it, so she opened the safe and pulled out papers and jewelry (Tr.441;Ex.69). She offered that there was a couple hundred dollars in her purse, and Mr. Long stated that there was a couple hundred dollars in the tin on top of the television (Tr.441-42;Ex.69). Carman let Mrs. Long get the money from her purse in the kitchen, while he retrieved the cash from the tin (Tr.441-42;Ex.69). Mr. Long offered to write a check (Tr.441,443).

Mr. and Mrs. Long lay on the bed with their heads to the side (Ex.69). For ten minutes, Carman stood at the foot of the bed wondering what to do (Tr.442; Ex.69). He "was nervous [and] didn't know what to do. I knew they'd already seen me and if I walked out of there and let them lay there I was in trouble anyway" (Ex.69). He simply did not know what to do (Ex.69). He was scared and nervous (Tr.450;Ex.69).

Tonia had been standing at the front door but ran back toward the bedroom and yelled that they needed to leave (Ex.69;Tr.442). Carman heard her run out to the car and the screen door slam shut (Ex.69). He was left "standing in there not knowing what to do, knowing that they already seen me. If I left I was going to go to jail. If I shot them I was going to jail. And just, uh, nervousness and sacredness. I just shot them" (Ex.69;Tr.442).

Carman shot Mr. Long twice in the head, and then immediately shot Mrs. Long twice in the head (Tr.442;Ex.69). With the tin and the money from Mrs. Long's purse, he ran out of the house (Tr.442;Ex.69).

Tonia's stomach had been bothering her all day and now really hurt (Ex.69). Carman drove her to the hospital, where she was admitted (Ex.69). He counted out the money – $410 – and gave his sister $250 (Tr.443;Ex.69).

At the end of his confession, Carman told the detective he was sorry and wished it had never happened (Tr.451).

Procedural History

Carman was charged with two counts of first-degree murder, two counts of armed criminal action, one count of first-degree robbery, and one count of first-degree burglary (L.F.54-56,61-63). In 1998, he was convicted of all counts (Tr.406). After five-and-a-half hours of deliberation, the jury recommended that Carman be sentenced to death, and the court did so (1st Tr.951-52;1st L.F.290-93). On appeal, this Court affirmed the convictions and death sentences. State v. Deck, 994 S.W.2d 527 (Mo.banc 1999). Carman filed a motion for postconviction relief,

which was denied at the circuit court level. Deck v. State, 68 S.W.3d 418, 422 (Mo.banc. 2002). This Court, however, overturned the motion court's ruling and remanded for a new penalty phase. *Id*.

Prior to the retrial, defense counsel filed a motion requesting that Carman be allowed to proceed through the penalty phase without restraints, but the court denied the motion (L.F.183-94). Shortly after voir dire started, defense counsel objected that Carman was in leg-irons and handchains, and that the restraints prejudiced him toward the jury and made him look dangerous (Tr.74). The court ruled, "[t]he objection that you're making will be overruled. He has been convicted and will remain in legirons and a belly chain" (Tr.74). Before the jury was sworn, defense counsel requested that the entire jury panel be stricken for cause because they had seen the restraints (Tr.257). The court overruled the motion (Tr.257).

During voir dire, the state moved to strike Venirepersons Michael Schaeffer and Richard Overmann based on their reluctance to impose a death sentence (Tr.241-43). Mr. Overmann believed that life without parole would be the way to go, but also stated that he would remain open-minded, listen to the evidence, and follow the court's instructions (Tr.238). Mr. Schaeffer stated that he did not know if he could impose a death sentence but would try to do his job as a juror (Tr.218). Over objection, the court sustained the motions to strike (Tr.241-43).

Before opening statements, the court read the instructions modeled after MAI-Cr3d 300.06, 302.01, 313.30A, 313.31 and 313.32, but failed to read the

instruction modeled after MAI-CR3d 302.02 (Tr.263). The court properly instructed the venirepanel prior to the first recess (Tr.140). But when the court divided the panel into small groups for death qualification, the court did not read the cautionary instruction (MAI-CR3d 300.04) to the first three of the four panels when each panel returned to the larger group (Tr.199, 215, 241). The court also failed to instruct the jurors at the end of the proceedings on the first day, at the end of the proceedings on the second day, and after both parties had rested (Tr.262,422,532-33).

At the new penalty phase, evidence of the crimes and evidence in mitigation was presented as detailed above. The state also presented victim impact testimony from two of the Longs' daughters and one son (Tr.387-400, 410-21). They described what their parents were like and how their deaths had affected them, the family at large, and friends of the family (Tr.387-402,410-421). Over objection, the court introduced into evidence the victims' family tree, spanning four generations and including people who had died, had not yet been born, or had not yet become part of the family by the time of the Longs' deaths (Tr.411). The court also allowed the son to present a three-page narrative (Tr.418-21). One of the daughters testified that her own daughter had told her that she was "very anxious about [coming to court] and very worried and concerned, scared" (Tr.399).

A child psychiatrist testified that the abuse, deprivation, and humiliation Carman experienced repeatedly throughout his childhood adversely affected his

development (Tr.480,502,504). Deprivation of food and affection led to a disruptive bonding and attachment pattern (Tr.501). He had difficulty in relationships, in performing to his highest ability, and in succeeding (Tr.504). It would have been difficult for Carman to seek help or treatment because of his tendency to minimize what had happened (Tr.500,504).

Michael testified that he loves his brother Carman and always will (M.D.Depo.17). He visited him in prison (M.D.Depo.26-27).

In closing, the state urged the jurors to sit for ten minutes and relive the victims' "ten minutes of terror" as Carman stood above them, while they lay on their stomachs begging for their lives (Tr.559). Defense counsel objected to the personalization, but the court overruled it (Tr.559).

The jurors were instructed that they must find at least one aggravator beyond a reasonable doubt (L.F.213,216,222). With regard to the next two steps of the process, however, the instructions did not specify (1) what the burden of proof was or (2) which party bore the burden of proof (L.F.217-18,223-24). Defense counsel did not object to these defects.

During its six-hour deliberations, the jury listened again to Carman's confession and viewed the crime scene photos (Tr.563;L.F.230). They requested to view the deposition of the child psychiatrist but were not allowed (L.F.230). The jury returned verdicts recommending death (Tr.563). The court overruled the motion for new trial and imposed death (Tr.565,570-71). Notice of Appeal was timely filed (L.F.261-63).

POINT I

The trial court abused its discretion in letting the state elicit from Deputy Sheriff Donna Thomas that Charles Hill told *her* that Tonia Cummings told *him* that a robbery and possible murder were going to occur in rural DeSoto involving an elderly gentleman. Allowing the double hearsay testimony violated Carman Deck's right to a fair trial, due process, to confront and cross-examine the witnesses against him, a fair and reliable sentencing, and to be free from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution. The state used the double hearsay to show that Mr. Deck was a cold-blooded killer who planned the robbery knowing that he likely would have to kill the victims. Without the hearsay, the only evidence of Mr. Deck's intent was his statement to the police that he planned only to rob the victims but killed them because he was scared and nervous, did not know what to do, and was under pressure when his sister ran in and told him they must leave immediately.

Bruton v. United States, 391 U.S. 123 (1968);

Enmund v. Florida, 458 U.S. 782 (1982);

State v. Robinson, 111 S.W.3d 510 (Mo.App. 2003);

United States v. Snider, 720 F.2d 985 (8th Cir. 1983);

U.S. Constitution, Amends. V, VI, VIII and XIV; and

Mo. Const., Art. I, Sections 10, 18(a) and 21.

POINT II

The trial court abused its discretion in overruling Carman Deck's "Motion to Have Accused Appear at Trial Free of Restraints" and in forcing him to appear throughout the entire penalty phase in both leg irons and handcuffed with a belly chain, because forcing Mr. Deck to appear before the jury in this manner deprived him of his rights to due process, equal protection, a fair and reliable sentencing, to confront the evidence against him, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10, 18 (a), and 21 of the Missouri Constitution, in that Mr. Deck's appearance in full restraints without good cause gave the jury the impression that the court believed – and therefore the jury should believe – that Mr. Deck was dangerous and an escape risk, two factors that the jury considers in its determination of whether the defendant should receive life imprisonment without the possibility of parole, or rather is too dangerous and must be sentenced to death. The restraints created a silent presumption favoring the state on the key issue of dangerousness, yet Mr. Deck had no chance to confront or refute the implicit evidence.

Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987);

Estelle v. Williams, 425 U.S. 501 (1976);

Holbrook v. Flynn, 475 U.S. 560 (1986);

Illinois v. Allen, 397 U.S. 337 (1970);

U.S. Constitution, Amends. V, VI, VIII and XIV; and

Mo. Const., Art. I, Sections 2, 10, 18(a) and 21.

POINT III

The trial court plainly erred in submitting Instructions 7 and 8 regarding Count I, and 12 and 13 regarding Count III, because the instructions violated Carman Deck's rights to jury trial, presumption of innocence, proof beyond a reasonable doubt, due process, reliable sentencing, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10, 18(a) and 21 of the Missouri Constitution. The instructions failed to instruct the jury that the state bore the burden of proving beyond a reasonable doubt that, respectively, (1) the aggravating facts and circumstances warranted death, and (2) the evidence in mitigation was not sufficient to outweigh the evidence in aggravation. Because Mr. Deck was sentenced to death by a jury that was not instructed both that the state bore the burden of proof and that the burden of proof was beyond a reasonable doubt, for two of the three steps that were required to find that he was "death-eligible," he suffered manifest injustice and must receive a new penalty phase.

Ring v. Arizona, 536 U.S. 584 (2002);

Schlup v. Delo, 513 U.S. 298 (1995);

State v. Whitfield, 107 S.W.3d 253 (Mo.banc 2003);

Sullivan v. Louisiana, 508 U.S. 275 (1993);

U.S. Constitution, Amends. V, VI, VIII and XIV;

Mo. Const., Art. I, Sections 10, 18(a) and 21;

Section 565.030, RSMo; and

Rule 30.20.

POINT IV

The trial court plainly erred in failing to read Instruction 2, based on MAI-CR3d 302.02; and repeatedly failed to read the cautionary instruction based on MAI-CR3d 300.04 and then refused to question the jurors once this failure was discovered. The court's failures created a manifest injustice to Carman Deck, in violation of his right to due process, a fair and reliable sentencing, and to be free from cruel and unusual punishment, as guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 21 of the Missouri Constitution. Mr. Deck suffered manifest injustice by the court's failure to read MAI-CR3d 302.02 prior to opening statements, because the instruction was necessary for the jury to understand – as it heard opening statements, the evidence, and closing arguments – what it could consider as evidence and what it must completely disregard, and without the instruction at the proper time, the entire structure of the trial was flawed. Mr. Deck suffered manifest injustice by the court's repeated failure to read the cautionary instruction, and his refusal to question the jury about what they may have heard or discussed, because the jury likely was affected by outside influences or formed premature opinions of the evidence.

Arizona v. Fulminante, 499 U.S. 279 (1991);

Brannaker v. Transamerican Freight Lines, Inc., 428 S.W.2d 524 (Mo.1968);

State v. Cross, 594 S.W.2d 609 (Mo.banc 1980);

State v. Ervin, 979 S.W.2d 149 (Mo.banc 1998);

U.S. Constitution, Amends. V, VIII and XIV;

Mo. Const., Art. I, Sections 10 and 21;

Rule 30.20; and

MAI-CR3d 300.04 and 302.02.

POINT V

The trial court abused its discretion and plainly erred in letting the State present victim impact testimony that far exceeded its proper scope – a family tree containing people who were not born, had already died, or were not yet married into the family by the time of the victims' death; a three-page emotionally-charged narrative; and hearsay testimony that the victims' granddaughter was worried and scared about coming to court. The excessive victim impact testimony violated Carman Deck's rights to due process, fair trial, reliable sentencing, and freedom from cruel and unusual punishment, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), 19, and 21 of the Missouri Constitution. The victim impact testimony far exceeded that which is authorized by §565.030.4 and Payne v. Tennessee, and its overwhelmingly emotional nature resulted in death verdicts based on emotion rather than rational thought.

Gardner v. Florida, 430 U.S. 349 (1977);

Payne v. Tennessee, 501 U.S. 808 (1991);

State v. Knese**,** 985 S.W.2d 759 (Mo.banc 1999);

Vickers v. State, 17 S.W.3d 632 (Mo.App. 2000);

U.S. Constitution, Amends. V, VI, VIII and XIV;

Mo. Const., Art. I, Sections 10, 18(a), 19, and 21;

Section 565.030, RSMo; and

Rule 30.20.

POINT VI

The trial court abused its discretion by letting the State, over objection, personalize its closing argument by urging the jurors to relive the victims' ten minutes of terror as they lay on their stomachs begging for their lives while Mr. Deck stood with a gun in his hand. The state's improper argument deprived Mr. Deck of his rights to due process, a trial before a fair and impartial jury, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution. The trial court's approval of the improper argument prejudiced Mr. Deck and affected the outcome of the trial by allowing fear and anger to replace reason in the jury's deliberations.

Caldwell v. Mississippi, 472 U.S. 320 (1985);

State v. Barton, 936 S.W.2d 781 (Mo.banc 1996);

State v. Rhodes, 988 S.W.2d 521 (Mo.banc 1999);

State v. Storey, 901 S.W.2d 886 (Mo.banc 1995);

U.S. Constitution, Amends. V, VI, VIII and XIV; and

Mo. Const., Art. I, Sections 10, 18(a), and 21.

POINT VII

The trial court abused its discretion in overruling Carman Deck's objections and sustaining the state's motions to strike Venirepersons Richard Overmann and Michael Schaeffer and for cause, in violation of Mr. Deck's rights to due process, fundamental fairness, trial by a fair, impartial and fairly selected jury, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10,18(a), and 21 of the Missouri Constitution. Mr. Overmann expressed a problem with the death penalty and his preference for a sentence of life without parole, but indicated that he would stay open-minded, listen to the evidence, and follow the court's instructions. Mr. Schaeffer merely indicated that he would be uncomfortable at the prospect of imposing a death sentence and stated that he did not know if he would be able to, although he would like to think he could do it. The erroneous exclusion of two jurors requires that Mr. Deck's death sentences be vacated and he be re-sentenced to life imprisonment without probation or parole or, alternatively, that the cause be remanded for a new penalty phase trial.

Adams v. Texas, 448 U.S. 38 (1980);

Morgan v. Illinois, 504 U.S. 719 (1992);

Wainwright v. Witt, 469 U.S. 412 (1985);

Witherspoon v. Illinois, 391 U.S. 510 (1968);

U.S. Constitution, Amends. V, VI, VIII and XIV; and

Mo. Const., Art. I, Sections 10, 18(a), and 21.

POINT VIII

The trial court erred in accepting the jury's death penalty verdicts and in sentencing Carman Deck to death, in violation of his rights to due process of law, fundamental fairness, reliable, proportionate sentencing, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, and Section 565.035.3(3). Pursuant to its independent duty to review death sentences under Section 565.035, this Court should reduce the death sentences to life imprisonment without parole, based on the wealth of mitigation evidence presented, the facts of the crime, and events at trial that resulted in verdicts based on hearsay, inferences, speculation, and emotion. This Court must engage in meaningful proportionality review by considering all similar cases. If it did, it would conclude that Mr. Deck's death sentences are excessive and disproportionate.

Caldwell v. Mississippi, 472 U.S. 320 (1985);

Cooper Industries v. Leatherman Tool Group Inc., 532 U.S. 424 (2001);

Gregg v. Georgia, 428 U.S. 153 (1978);

State v. McIlvoy, 629 S.W.2d 333 (Mo.banc 1982);

U.S. Constitution, Amends. V, VI, VIII and XIV;

Mo. Const., Art. I, Sections 10, 18(a), and 21; and

Section 565.035.

POINT IX

The trial court lacked jurisdiction and authority to sentence Carman Deck to death because the state never charged him with the only offense punishable by death in Missouri – *aggravated* first degree murder. The state failed to plead in the indictment those facts, required by Section 565.030.4(1), (2), and (3), that the jury must find beyond a reasonable doubt before a defendant may be sentenced to death. Furthermore, Mr. Deck was charged with the lesser offense of *unaggravated* first degree murder, not punishable by death and, as a result, his death sentence violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article 1, §§ 10, 17, 18(a), and 21 of the Missouri Constitution.

Apprendi v. New Jersey, 530 U.S. 466 (2000);

Ring v. Arizona, 536 U.S. 584 (2002);

Sattazahn v. Pennsylvania, 537 U.S. 101 (2003);

State v. Whitfield, 107 S.W.3d 253 (Mo.banc 2003);

U.S. Constitution, Amends. V, VI, VIII and XIV;

Mo. Const., Art. I, Sections 10, 17, 18(a), and 21; and

Section 565.030.

ARGUMENT I

The trial court abused its discretion in letting the state elicit from Deputy Sheriff Donna Thomas that Charles Hill told *her* that Tonia Cummings told *him* that a robbery and possible murder were going to occur in rural DeSoto involving an elderly gentleman. Allowing the double hearsay testimony violated Carman Deck's right to a fair trial, due process, to confront and cross-examine the witnesses against him, a fair and reliable sentencing, and to be free from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution. The state used the double hearsay to show that Mr. Deck was a cold-blooded killer who planned the robbery knowing that he likely would have to kill the victims. Without the hearsay, the only evidence of Mr. Deck's intent was his statement to the police that he planned only to rob the victims but killed them because he was scared and nervous, did not know what to do, and was under pressure when his sister ran in and told him they must leave immediately.

"For purposes of imposing the death penalty, [the defendant's] criminal culpability must be limited to his participation in the [crime], and his punishment must be tailored to his personal responsibility and moral guilt." Enmund v. Florida, 458 U.S. 782, 801 (1982). A criminal sentence "must be directly related

to the personal culpability of the criminal offender." Tison v. Arizona, 481 U.S. 137, 149 (1987). In determining whether Carman Deck should live or die, the jury was assigned the task of assessing his personal responsibility and moral guilt for the deaths of the two victims. From the first trial, the state knew this was a close penalty case, with "substantial" evidence in mitigation. Deck v. State, 68 S.W.3d 418, 431 (Mo.banc 2002). To increase its chances of success, the state therefore reached outside the permissible scope of the evidence to elicit double hearsay, thus unfairly exaggerating the main factors for the jury's consideration – Mr. Deck's culpability and moral guilt.

At issue was the extent to which Mr. Deck had planned to kill the victims before he arrived at the house. In his statement to the police, Mr. Deck admitted that he committed the crimes (Ex.69). He did not state that he had planned to kill the victims. His plan was to get money from the safe (Tr.450; Ex.69). He stated that he only shot the victims as paced at the foot of their bed, nervous, scared, not knowing what to do, and under pressure by his sister, who rushed in and shouted that they had to leave (Tr.442,450; Ex.69).

In sharp contrast is the picture the state painted through Deputy Donna Thomas' hearsay testimony. Over objection and without giving any legal basis, the state elicited from Deputy Thomas that Charles Hill told her "that a robbery and possible murder was going to occur in rural DeSoto with an elderly gentleman" (Tr.281). Deputy Thomas testified that Mr. Hill told her that he received this information from a former girlfriend (Tr.282). Mr. Hill told Deputy

Thomas that the people who would be involved were Tonia Cummings and Carman Deck (Tr.282). This multi-layered hearsay testimony was the only source of evidence that Mr. Deck had actually anticipated killing at least one victim before he stood at the foot of the bed. The issue is included in the motion for new trial (Supp.L.F.9).

A bedrock principle of American jurisprudence is that a criminal defendant has the right to confront and cross-examine the witnesses against him:

> The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.' It is, indeed, 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.'

Chambers v. Mississippi, 410 U.S. 284, 302 (1973), citing Dutton v. Evans, 400 U.S. 74, 89 (1970); Bruton v. United States, 391 U.S. 123, 135-137 (1968); Pointer v. Texas, 380 U.S. 400, 405 (1965). The denial or significant limitation of the right to confront and cross-examine "calls into question the ultimate 'integrity of the fact-finding process.'" Chambers, 410 U.S. at 295; Berger v. California, 393 U.S. 314, 315 (1969). The Sixth Amendment's right of an accused to confront the witnesses against him is a fundamental right and is made obligatory on the states by the Fourteenth Amendment. Pointer, 380 U.S. at 404.

Hearsay evidence is in-court testimony of an extrajudicial statement offered to prove the truth of the matters asserted therein, resting for its value upon the

credibility of the out-of-court declarant. State v. Harris, 620 S.W.2d 349, 355 (Mo.banc 1981). The rule barring hearsay testimony protects a defendant from accusations from out-of-court declarants "who cannot be cross-examined as to the bases of their perceptions, the reliability of their observations, and the degree of their biases." State v. Brown, 833 S.W.2d 436, 438 (Mo.App. 1992). Admission of hearsay that does not fall within a deeply rooted exception violates the Confrontation Clause. Ohio v. Roberts, 448 U.S. 56, 66 (1980).

Hearsay within hearsay is admissible only where both hearsay statements fall within exceptions to the hearsay rule. State v. Wolfe**,** 13 S.W.3d 248, 262 (Mo.banc 2000). Thus, Deputy Thomas' testimony would only be permissible if both (1) Ms. Cummings' statement to Mr. Hill and (2) Mr. Hill's statement to Deputy Thomas fall within an exception to the rule barring hearsay. Neither does.

First Level Hearsay: Tonia Cummings to Charles Hill

Tonia Cummings was a co-defendant and did not testify at Mr. Deck's trial, either in guilt phase or in this penalty phase retrial. The state should not have been allowed to use the statement of a non-testifying co-defendant.

In Bruton, 391 U.S. at 123, two men were charged with armed postal robbery. At a joint trial, a postal inspector testified that one of the defendants – Evans – confessed that he and Bruton committed the robbery. *Id*., 391 U.S. at 124. The trial court instructed the jury that it could use the confession as evidence against Evans but not against Bruton. *Id*., 391 U.S. at 125.

The Supreme Court emphasized that Evans' hearsay statement inculpating Bruton was clearly inadmissible against him under traditional rules of evidence. *Id*., 391 U.S. at 129, fn. 3. Even though the jury was instructed not to consider the confession against Bruton, there existed too great a risk that the jury would be unable to disregard the confession. *Id*., 391 U.S. at 135-36. The Supreme Court reversed, holding that admission of Evans' confession in the joint trial violated Bruton's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. *Id*., 391 U.S. at 136.

In Lilly v. Virginia, 527 U.S. 116 (1999), the Supreme Court considered the admissibility of a co-defendant's confession at the defendant's trial when the co-defendant did not testify. The Supreme Court concluded that, "The decisive fact, which we make explicit today, is that accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence." *Id*., 527 U.S. at 134.

Since Ms. Cummings was not subject to cross-examination, her statement to Mr. Hill was not admissible against Mr. Deck. Nor was the statement admissible as a statement of a co-conspirator, since the statement was not made in furtherance of the alleged conspiracy. For a statement to be admissible under the co-conspirator exception to the rule barring hearsay, the state must prove that a conspiracy existed and the statement must have been made in furtherance of the conspiracy. State v. Ferguson, 20 S.W.3d 485, 496 (Mo.banc 2000); State v. Clay,

975 S.W.2d 121, 131-32 (Mo.banc 1998)(statement must be in furtherance of conspiracy).

To establish that a statement was made in furtherance of a conspiracy, the government must show that the statements were more than informative and that they were made to "advance the objectives of the conspiracy." United States v. Guerra**,** 113 F.3d 809, 814 (8th Cir. 1997), *quoting* United States v. Baker, 98 F.3d 330, 336 (8th Cir. 1996). The overall effect of the statement must have been to facilitate the conspiracy. United States v. Edwards**,** 994 F.2d 417, 422 (8th Cir. 1993); *see also* State v. Fleischer**,** 873 S.W.2d 310, 313 (Mo. App. 1994). Mere conversation about the conspiracy is insufficient:

> A conspirator's casual comments to people outside or inside the conspiracy do not meet the 'in furtherance' requirement. To be admissible, the statements must somehow advance the objectives of the conspiracy, not merely inform the listener of the declarant's activities.

United States v. Snider**,** 720 F.2d 985, 992 (8th Cir. 1983) (internal citations omitted).

In his deposition, Mr. Hill stated that on three occasions, Ms. Cummings told him about the plan to "rob" the victims' house (Supp.L.F.40-42,44-45,52-53). Each time, he "tried to reason with her, tried to tell her that she's making a big mistake" (Supp.L.F.57). Mr. Hill didn't know why Ms. Cummings told him, other than perhaps "she might have been looking for a way out" (Supp.L.F.88). Ms.

Cummings never asked Mr. Hill to do anything or participate in any way (Supp.L.F.88-89).

Ms. Cummings' statements to Mr. Hill were not made in furtherance of the conspiracy, but instead merely informed Mr. Hill of Ms. Cummings' activities. Rather than further the conspiracy, the statements resulted in Mr. Hill's attempts to thwart the alleged plan (Supp.L.F.88-89). Ms. Cummings' statements to Mr. Hill were inadmissible.

Second Level Hearsay: Charles Hill to Deputy Sheriff Thomas

An exception to the rule barring hearsay testimony is that the testimony may be elicited – not for the truth of the matter asserted – but rather to explain an officer's subsequent conduct. State v. Dunn, 817 S.W.2d 241, 243 (Mo.banc 1991). The rationale for allowing this testimony for this limited purpose is to enable the jury to understand the events in question without speculating on the cause or reason for the officer's subsequent actions. State v. Brooks, 618 S.W.2d 22, 25 (Mo.banc 1981).

But when testimony – that otherwise would be inadmissible as hearsay – is admitted to explain subsequent conduct, it must be admitted only for that limited purpose. *See, e.g.*, State v. Robinson, 111 S.W.3d 510 (Mo.App. 2003); State v. Costello, 829 S.W.2d 556, 557-58 (Mo.App. 1992); State v. Shigemura, 680 S.W.2d 256, 258 (Mo.App. 1984). The testimony may only go so far as to explain the subsequent conduct; details of the statement that are not essential to show subsequent conduct are inadmissible hearsay.

In Moore v. United States, 429 U.S. 20 (1976), police officers received a tip from an informant that the defendant and others were in possession of heroin at the defendant's apartment. The key issue was whether it really was the defendant's apartment. *Id*., at 20-21. In making its findings on that issue, the trial court expressly relied on the hearsay declaration of the informant. *Id*., at 21.

The Supreme Court reversed, holding that "there can be no doubt" that the informant's out-of-court declaration, providing details on the key issue, was inadmissible. *Id*. The defense was denied the opportunity to cross-examine the informant to ascertain why he believed the apartment was the defendant's, or to show that the informant was wrong or that he was not credible. *Id*., at 21-22.

In State v. Kirkland, 471 S.W.2d 191 (Mo. 1971), the defendant was convicted of robbing a cab driver. The state's case rested solely upon the identification by the cab driver. *Id*., at 193. To bolster its case, the state elicited from a police officer that he went to the co-defendant's house immediately after talking to a witness who told him that she had seen the defendant and co-defendant get into the cab. *Id*. The court instructed the jury not to consider the testimony for the truth, but to explain why the police officer went to the co-defendant's house. *Id*.

This Court reversed, holding that the witness' statement had no bearing on any issue other than whether the defendant boarded the cab and robbed the driver. *Id*., at 194. Since this was the key issue, the defendant was entitled to cross-

examine the witness; cross-examination of the officer who took the statement from the witness would not suffice. *Id*.

This Court has recently accepted transfer in State v. Garrett, SC#85651. There, the state elicited testimony from a police officer that a confidential informant told him that the defendant was selling drugs from his home at a given address. 2003 WL 22228575, at p.2 (Mo.App.S.D, Sept.29,2003). The state mentioned this information in opening statement and also stressed it during closing arguments. *Id*., at 2-3.

The Court of Appeals for the Southern District reversed. *Id*., at 7. It held that the state had no legitimate need to give the details provided by the confidential informant:

> It would have been more than sufficient, if the State wished to provide the jury a context in which to view [the officer's] subsequent actions, for [the officer] to have testified that he approached [Defendant] or went to [the address] by stating that he did so upon information received.

Id., at 4. Clearly, the informant's statements to the officer were being offered for their truth, given the prosecutor's urgings in closing argument that the jurors use the statements to "connect some more dots" regarding the defendant's participation in the charged crimes. *Id*

Finally, in Robinson, 111 S.W.3d at 513, a police officer was allowed to testify three times that he had received a call from a reliable source that the defendant was keeping marijuana and crack cocaine in his girlfriend's house at a

certain address. The prosecutor referred to this evidence during closing argument. *Id*. During deliberations, the jury sent a question asking what the informant had said, and the court responded that the jury should base its decision on the evidence as it recalled it. *Id*.

In reversing, the Southern District held that the details of the informant's statement "went beyond the scope necessary to show subsequent conduct of law enforcement and was prejudicial." *Id*., at 515. The officer's testimony would have adequately explained the officer's subsequent conduct merely by stating that "the reason they went to the address was because of information received from the informant that marijuana and crack cocaine were present there." *Id*., at 514. The appellate court stressed that the lack of any instruction to the jury on how it could consider the informant's statement exacerbated the prejudice. *Id*.; *see also* Shigemura, 680 S.W.2d at 257 (reversing due to admission of hearsay statement of confidential informant that the defendant possessed stolen property and planned to sell it).

The way this issue was handled during Mr. Deck's first trial demonstrates that the testimony exceeded its proper scope. Prior to the first trial, the court sustained defense counsel's motion to preclude the state from eliciting Tonia Cummings' statements to Charles Hill (1st L.F.178-84). During guilt phase, the state carefully elicited the necessary testimony without eliciting hearsay:

Q: Did you have a conversation with Detective Streckfuss?

A: Yes.

Q: Based upon that information, I'm not asking you what the information was, but just based on it, what, if any, action did you take?

A: I contacted an individual that he gave me a name of.

Q: And who was that?

MR. COX (defense counsel): Objection, Your Honor, based on our previous motion.

MR. JERRELL (prosecutor): I'm just asking who she contacted.

THE COURT: Overruled.

Q: Who'd you contact?

A: Charles Hill.

Q: Did he also give you some information?

A: Yes, he did.

Q: Based on that information was an attempt to find an address made on some individuals?

A: Yes, there was.

Q: What address was found, if any?

A: 1230 Enderbury, Covington Manor Apartments, number ten, in St. Louis County.

Q: And whose addresses were you attempting to find?

A: Tonia Cummings and Carmen Deck.

Q: Based upon that information was any other law enforcement agency asked to assist in finding these people?

A: Yes.

(1st Tr.554-55).

In contrast, at the re-trial, presided over by the same judge, the same prosecutor elicited the details of the hearsay:

Q: On July 8th of 1996 did you receive a call from Detective Bob Streckfuss of the Arnold Police Department?

A: Yes, I did.

Q: Did you speak with him?

A: Yes.

Q: Did he give you a name of a person who had given him some information?

A: Yes, he did.

Q: Who was that person?

A: Charles Hill.

Q: Did you contact Charles Hill?

A: Contacted him by telephone, yes.

Q: Did you have a conversation with him?

A: Yes, I did.

Q: Based upon that conversation did you have the Sheriff's Department take some subsequent action?

A: Yes.

Q: In a nutshell, basics, what information did he give you?

A: He had given me information that a robbery and possible murder –

MR. BRUNS (defense counsel): Judge, I'm gonna object to the hearsay.

THE COURT: Overruled.

A: -- that a robbery and possible murder was going to occur in rural DeSoto with an elderly gentleman….

Q: How did he know this information?

A: He received this information from a former girlfriend.

Q: Did he give you the names of the possible people who would be involved in this robbery and possible murder?

A: Tonia Cummings and Carman Deck.

(Tr.281-282). The same judge and prosecutor were involved in both trials (1st Tr.554-55; Tr.281-82). There was no reason to change the ruling. The testimony was hearsay the first time around, and it remained hearsay at the retrial.

The prosecutor's closing argument revealed that it was offering Mr. Hill's statement to the deputy sheriff for the truth of the matter asserted, not to show subsequent conduct. The prosecutor argued, "[Mr. Deck] didn't know his sister had spilled her guts already to her boyfriend" (Tr. 548). Defense counsel objected that the prosecutor was stating facts not in evidence, but the court overruled the objection (Tr.548). The argument had only one source: Deputy Thomas' testimony that Mr. Hill told her that Ms. Cummings told him about the crime/s (Tr.281-82). Thus, Ms. Cummings' statement to Mr. Hill was to be considered as substantive evidence, not merely to explain the officer's subsequent conduct. The

court's response indicated to the jury that the details of the testimony were properly in evidence and could be considered by the jury in reaching its verdict (Tr.548). After all, the court never instructed the jury otherwise. Deputy Thomas' subsequent action was merely a pretext for admitting inadmissible hearsay.

Standard of Review

Although the trial court has broad discretion to admit evidence at trial, it abuses that discretion when its ruling clearly offends the logic of the circumstances or when it becomes arbitrary and unreasonable. State v. Hall, 982 S.W.2d 675, 680 (Mo.banc 1998). An abuse of discretion in admitting challenged evidence is reversible error only if the admission so prejudiced the defendant that it deprived him of a fair trial. State v. McMillin, 783 S.W.2d 82, 98 (Mo.banc 1990). The defendant must show a reasonable probability that without the admission of the evidence, the verdict would have been different. State v. Moore, 88 S.W.3d 31, 36 (Mo.App. 2002).

Trial court error, timely preserved, creates the presumption of prejudice. State v. Rhodes, 988 S.W.2d 521, 529 (Mo.banc 1999). The state bears the burden of showing that the error was harmless without question. State v. Degraffenreid, 477 S.W.2d 57, 64 (Mo.banc 1972). Typically, this occurs when the result would have been the same regardless of the erroneous evidence, because the evidence in support of the verdict was overwhelming, State v. Ford, 639 S.W.2d 573, 576 (Mo.banc 1982), or because of the facts and circumstances of the particular case, State v. Burton, 641 S.W.2d 95, 99 (Mo.banc 1982), or if the record demonstrates

the evidence did not influence the jury or the jury disregarded it. State v. Wright, 582 S.W.2d 275, 277 (Mo.banc 1979). "In a jury trial, when evidence is admitted that should have been excluded, this court is required to assume that the jury considered that evidence as it reached its verdict." Robinson, 111 S.W.3d at 514, *quoting* Gates v. Sells Rest Home, Inc., 57 S.W.3d 391, 396 (Mo.App. 2001).

Carman Deck Suffered Prejudice from the Hearsay Testimony

The hearsay testimony communicated to the jury that before Mr. Deck went into the house, he was contemplating robbing and potentially murdering at least one victim. This testimony directly conflicted with Mr. Deck's statement to the police that he went to the house to rob, and he killed the victims – not because of a thought-out plan to do so – but because he was scared and nervous and didn't know what to do (Ex.69). Without the hearsay testimony, the state had no evidence that Mr. Deck had planned on killing either of the victims before he arrived at the house. The hearsay testimony elevated Mr. Deck from a burglar/robber who placed himself in a bad situation and then, under pressure, made an abysmal decision; to a cold-blooded killer who went to the house with a design to rob and kill. The testimony thus struck at the heart of Mr. Deck's character and culpability, the key considerations in penalty phase. Enmund, 488 U.S. at 801; Tison, 481 U.S. at 149; Lockett v. Ohio, 438 U.S. 586, 605 (1978) (punishment must be consistent with an individualized consideration of the defendant's culpability).

The hearsay testimony conflicted with Mr. Deck's statement to the police, thus implying that he lied in the statement. But if the jury discounted Mr. Deck's statement to the police, it also discounted key points in mitigation. After all, the statement explained that Mr. Deck was scared and nervous and didn't know what to do as he stood at the foot of the bed (Ex.69). In the statement, he expressed remorse, stating that he was sorry and wished it had never happened (Ex.69). Defense counsel believed that the statement was so helpful to Mr. Deck that he urged the jurors to listen to it again during deliberations (Tr.557). If the jury was led to believe from the hearsay that Mr. Deck lied in the statement, it must have unfairly discounted valuable mitigation evidence.

The state used the hearsay throughout the trial: in opening statement, during Deputy Thomas' testimony, and in closing. In opening statement, the state asserted that the evidence would show the following:

> On that same day Detective Donna Thomas with the Jefferson County Sheriff's Department receives a call from Detective Streckfuss of the Arnold Police Department. He indicates that a person had called and indicated that a crime may be committed in rural Jefferson County, Missouri, around DeSoto, but he doesn't know the exact address. Detective Donna Thomas contacts this person. The person's name is Charles Hill, who happens to be the boyfriend of the Defendant, Carman Deck's sister, who is Tonia Cummings. Detective Thomas interviews Charles Hill. He indicates basically doesn't

know if it's happened, but it could be a robbery, burglary and a possible murder somewhere in south Jefferson County.

(Tr.265). After eliciting the hearsay testimony from Deputy Thomas, the state referred to the "robbery and possible murder" two more times during her testimony (Tr.282,284). Throughout the rebuttal portion of its closing argument, the state stressed the hearsay evidence by arguing that Mr. Deck went to the house willing and prepared to kill, and that the victims were effectively dead even before Mr. Deck and Ms. Cummings entered the house (Tr.559-61).

The jury deliberated six hours before recommending death (Tr.563). As in the first trial, the evidence in mitigation was substantial. The hearsay testimony, repeated throughout the trial, was the type of evidence that must have swayed the jury.

"The penalty of death is qualitatively different from a sentence of imprisonment, however long…. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). There is no such reliability here. By allowing the state to obtain a death sentence based on testimony that was not subject to cross-examination, the trial court violated Mr. Deck's rights to a fair trial, due process, to confront and cross-examine the witnesses against him, a fair and reliable sentencing, and to be free from cruel and unusual punishment, as guaranteed by

the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution. This Court must vacate the death sentences and remand for a new sentencing trial.

ARGUMENT II

The trial court abused its discretion in overruling Carman Deck's "Motion to Have Accused Appear at Trial Free of Restraints" and in forcing him to appear throughout the entire penalty phase in both leg irons and handcuffed with a belly chain, because forcing Mr. Deck to appear before the jury in this manner deprived him of his rights to due process, equal protection, a fair and reliable sentencing, to confront the evidence against him, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10, 18 (a), and 21 of the Missouri Constitution, in that Mr. Deck's appearance in full restraints without good cause gave the jury the impression that the court believed – and therefore the jury should believe – that Mr. Deck was dangerous and an escape risk, two factors that the jury considers in its determination of whether the defendant should receive life imprisonment without the possibility of parole, or rather is too dangerous and must be sentenced to death. The restraints created a silent presumption favoring the state on the key issue of dangerousness, yet Mr. Deck had no chance to confront or refute the implicit evidence.

Courts universally have acknowledged that handcuffs and shackles mark the defendant as a dangerous man, someone who cannot control himself even within the parameters of the courtroom; an untrustworthy person; or someone who

is so likely to escape that he must be fully restrained. During the entire penalty phase, Carman Deck was forced to wear shackles and was handcuffed to a belly chain within full view of the jury (Tr.74). This jury would decide whether Mr. Deck would be sentenced to death or life imprisonment based, at least in part, upon their belief that he would be dangerous in prison or at risk to escape. The court's order requiring the full restraints – made without good cause, without consideration of less prejudicial measures, and over timely objection – deprived Mr. Deck of his rights to due process, equal protection, a fair and reliable sentencing, to confront the evidence against him, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article 1, Sections 2, 10, 18 (a), and 21 of the Missouri Constitution.

The United States Supreme Court has not yet addressed whether a defendant may be forcibly shackled and handcuffed during a capital penalty phase trial. But it has made crystal clear that "no person should be tried while shackled and gagged except as a last resort." In Illinois v. Allen, 397 U.S. 337, 344 (1970), the Supreme Court stressed several problems with the use of restraints. First, "the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant." *Id*. Additionally, the use of restraints "is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." *Id*. Finally, one of the defendant's primary advantages of being present at trial – the ability to communicate with counsel – is greatly

reduced when the defendant is totally restrained. *Id*. Notably, the Court did not ground its aversion to restraints on how they could affect the presumption of innocence, which is so crucial in guilt phase but obviously not at issue in penalty phase. In fact, the Court never mentioned the presumption of innocence.

Several years later, when considering whether a defendant could be forced to proceed to trial in prison clothing, the Court held that certain practices pose such a threat to the "fairness of the factfinding process" that they must be subjected to "close judicial scrutiny." Estelle v. Williams, 425 U.S. 501, 503-504 (1976). The Court held that forcing a defendant to appear in prison clothing does not further an essential state interest yet threatens the presumption of innocence and violates the defendant's right to equal protection. *Id.*, 505-506,512. "The constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment." *Id*., at 504-505.

In Holbrook v. Flynn, 475 U.S. 560, 568-69 (1986), the Supreme Court confirmed that practices such as shackling and other overt displays of security are inherently prejudicial and "should be permitted only where justified by an essential state interest specific to each trial." The Court noted that "shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large." *Id*. The Court again did not ground its opinion on the presumption of innocence.

Although the trilogy of Supreme Court cases dealt with guilt phase, nothing within their language suggests that the holdings should not apply to penalty phase

as well. Elledge v. Dugger, 823 F.2d 1439, 1451 (11th Cir. 1987). Neither Illinois v. Allen nor Holbrook is grounded upon the presumption of innocence. In fact, the term "presumption of innocence" does not arise at all in Illinois v. Allen and is mentioned only once in Holbrook. The Court recognized repeatedly that practices such as shackling taint how the jury views the defendant and can cause the jury to believe the defendant is dangerous, untrustworthy, or at risk to escape. Illinois v. Allen, 397 U.S. at 344; Estelle, 425 U.S. at 504-505; Holbrook, 475 U.S. at 568-69. Practices such as shackling are as problematic, if not more, in penalty phase – where the defendant's dangerousness is a critical issue – as in guilt phase.

Other jurisdictions have applied the principles as stringently – or more stringently – in penalty phase as in guilt phase. In Roche v. Davis, 291 F.3d 473, 484 (7th Cir. 2002), the United States Court of Appeals for the Seventh Circuit held that the defendant was not denied his right to the effective assistance of counsel by his attorney's failure to object to his appearance in shackles in guilt phase. But the Seventh Circuit held that the defendant's right to the effective assistance was violated by the attorney's failure to object to the shackles in penalty phase. *Id*. Because the mitigating evidence was strong, and the jury deliberated in penalty phase eight hours without being able to recommend a death sentence, a reasonable probability existed that the shackling made a difference in the outcome of the trial. *Id*.

Relief also has been granted in the following cases when the defendant was forced to proceed through penalty phase in shackles and/or handcuffs: Laird v.

Horn, 159 F.Supp.2d 58, 99-102 (E.D.Pa. 2001) (granting habeas relief due to handcuffs and shackles in penalty phase even though defense counsel did not object); Lovell v. State, 702 A.2d 261 (Md. 1997) (new penalty phase due to shackling and handcuffs, even though court instructed the jurors to disregard restraints); Duckett v. Godinez, 67 F.3d 734, 747 (9th Cir. 1995) (new penalty phase granted, because there was insufficient need for shackles and court failed to consider alternatives); Bello v. Florida, 547 So.2d 914 (Fla.1989) (shackling of defendant during penalty phase was prejudicial error where trial court overruled objection without making any inquiry into necessity for shackling); Elledge, 823 F.2d at 1450-52 (new penalty phase ordered because no showing that shackling was necessary, or that court considered alternatives to shackling).

Missouri Must Follow the Supreme Court Mandate of Applying Close Judicial Scrutiny to the Use of Restraints in the Courtroom

This Court must follow the mandate of the United States Supreme Court to apply close judicial scrutiny to the inherently prejudicial practice of shackling. It must follow the lead of the Supreme Court, as the vast majority of state and federal courts have done, in upholding the use of restraints only where good cause was shown, only when the restraints were used as a last resort, and only after measures were taken to reduce the prejudicial impact of the restraints upon the jury. This Court must uphold these precedents for both guilt and penalty phases.

Guilt Phase

This Court traditionally has been vigilant against the unnecessary use of restraints. In State v. Rice, 149 S.W.2d 347, 348 (Mo.1941), this Court granted a new trial to the two defendants because, over objection, they had been handcuffed in view of the jury during voir dire and possibly longer. This Court stressed that under the common law, when a defendant is brought to trial, he is entitled to appear free from all shackles. *Id*. To justify shackling of a defendant during trial, "there must arise during the trial some good reason therefore based upon the conduct of the prisoner, in the absence of which such action would be improper and would deprive the defendant of a substantial legal right, to his prejudice." *Id*.

When shackles have been necessary, this Court has upheld the action only when the trial court ensured that any prejudice to the defendant was significantly reduced. In State v. Amrine**,** 741 S.W.2d 665, 675 (Mo.banc 1987), the defendant's legs were shackled to his chair. The court made every effort to minimize the chance that the jury would notice the shackles. *Id.* It called a recess when the defendant took the witness stand so that the jury would not see the shackles. *Id.* The court also stated in the pretrial conference that he did not "want [the defendant] paraded in front of the jury in handcuffs." *Id.* This Court held that the trial court acted within its discretion by attempting to minimize prejudice while preserving courtroom security. *Id.; see also* State v. Kinder**,** 942 S.W.2d 313, 330 (Mo.banc 1996) (defendant required to wear leg irons during a short period in guilt

phase due to comments he had made, but upon defense counsel's request, they were removed immediately, and it is unclear that the jury actually saw them).

Penalty Phase

In penalty phase too, this Court has mandated that trial courts restrain defendants only for good cause shown and only as a last resort. In State v. Brooks, 960 S.W.2d 479, 491-92 (Mo.banc 1997), as the guilty verdicts were being read, the bailiffs made Brooks stand, handcuffed him, and then had him sit again in his chair, in full view of the jury. Defense counsel requested a penalty phase mistrial, but the court refused. *Id*., at 491.

This Court stressed that shackling in the presence of the jury should be avoided whenever possible. *Id*., at 491-92. It held that the trial court had not abused its discretion, because the jury observed Brooks in shackles only briefly, the jury saw him only after the close of the guilt phase, the jury was dismissed shortly thereafter, and Brooks appeared without restraints throughout the remainder of the trial. *Id*., at 491.

But more recently, this Court seems to have fallen away from the majority of state and federal courts and relaxed its scrutiny of the use of restraints in penalty phase. In State v. Hall**,** 982 S.W.2d 675, 685 (Mo.banc 1998), this Court summarily held that the trial court did not err in overruling Hall's objections to wearing leg and waist shackles during the penalty phase.

Even there, however, the trial court had taken measures to reduce the prejudice. Hall v. Luebbers**,** 296 F.3d 685, 698-99 (8th Cir. 2002). When the jury

was brought in for penalty phase, Hall was already in the courtroom wearing handcuffs and shackles. *Id*. The court removed the handcuffs at once but left the shackles, and they remained for the two to three hours that Hall was in the jury's presence. *Id*. There was no evidence that the jurors ever saw the leg and waist shackles, or that Hall's ability to participate in the proceedings was hindered, and the immediate removal of the handcuffs ameliorated any prejudice. *Id*.

The Trial Court's Order Cannot Withstand Close Scrutiny

Applying the close judicial scrutiny mandated by the Supreme Court, the death sentence cannot stand. Carman Deck was forced to proceed throughout three days of proceedings in both shackles and handcuffed to a belly chain, and was paraded before the jury in this manner numerous times. This was not a brief, inadvertent exposure of the jury to the defendant in shackles. *See*, *e.g*, State v. McMillian, 779 S.W.2d 670 (Mo.App. 1989). It was not grounded on good cause necessary to further an essential state interest, nor was it only used as a last resort.

Prior to trial, the court ordered that Mr. Deck be allowed to wear his own clothes during the trial (L.F.169). Defense counsel filed a motion requesting that Mr. Deck be allowed to proceed through the penalty phase without restraints, but the court denied the motion (L.F.183-94).

Shortly after voir dire started, defense counsel objected that Mr. Deck was in leg-irons and handchains and that the restraints prejudiced him toward the jury and made him look dangerous (Tr.74). The court ruled, "[t]he objection that you're making will be overruled. He has been convicted and will remain in

legirons and a belly chain" (Tr.74). During voir dire, defense counsel briefly questioned the panel about the effect of seeing Mr. Deck in legirons and handcuffs (Tr.165).

Before the jury was sworn, defense counsel requested that the entire jury panel be stricken for cause (Tr.257). Defense counsel argued that seeing Mr. Deck shackled would make the jurors believe that he is violent and would do something in the courtroom or to the jurors (Tr. 257). Defense counsel argued that the restraints put the jurors in fear of Mr. Deck, which is not appropriate for the people who would decide the punishment (Tr.257). The court overruled the motion, reasoning that the restraints removed any fear the jurors may have (Tr.257).

Defense counsel included the issue in the motion for new trial (Supp.L.F. 4-5). The motion indicated that the court had initially indicated to defense counsel that Mr. Deck would wear only a leg brace under his clothes for security purposes (Supp.L.F.4). But on the day trial started, the court ordered that Mr. Deck would wear shackles and would be handcuffed with a belly chain throughout the trial (Supp.L.F.4). Defense counsel stated in the motion for new trial that there were numerous times when the jury clearly saw Mr. Deck – with chains, handcuffs and shackles – paraded in and out of the courtroom or standing when the judge and jury entered or left the room (Supp.L.F.4-5). At sentencing, the state did not dispute any of these facts. The court overruled the motion for new trial (Tr.565).

Standard of Review

The use of restraints for maintaining security and order in the courtroom is within the trial court's discretion. State v. Sanders, 903 S.W.2d 234, 239 (Mo.App.1995). The trial judge has the responsibility for the conduct of the trial, the safety of persons in the courtroom, and the prevention of escape. State v. Endicott, 881 S.W.2d 661, 663 (Mo.App. 1994). "If the trial judge finds that 'good reason' or 'exceptional circumstances' exist, he may require the physical restraint of the defendant." *Id*. In making that determination, the court has "considerable, but not unlimited, discretion." *Id*. A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. State v. Brown, 939 S.W.2d 882, 883-84 (Mo.banc 1997).

The Shackles and Handcuffs Were Not Warranted

The state failed to show any cause, much less good cause, for restraining Mr. Deck. Nothing in the record indicates that Mr. Deck created a disturbance, tried to assault anyone, or tried to escape. His prior record involves all non-violent convictions – burglary and stealing, and one conviction for aiding an escape around the time that he was gang-raped in prison (Tr.402-405,500). Neither the court nor the state made any record of an essential state interest that was furthered by forcing Mr. Deck to proceed throughout penalty phase in both shackles and handcuffed to a belly chain.

The only reason suggested by the court was that Mr. Deck had been convicted of first-degree murder. But the mere fact that Mr. Deck had been convicted of first-degree murder does not warrant the use of full restraints. State v. Young, 853 P.2d 327, 350 (Utah 1993) (conviction alone should not be sufficient evidence of violence to sustain shackling a defendant during the penalty phase; instead, trial court should look at the circumstances of the proceeding as a whole); Duckett v. Godinez, 67 F.3d 734, 748 (9th Cir. 1995). If that were so, every capital defendant would proceed through penalty phase in such a manner. Clearly, that does not occur. Nothing specific to this case warrants the use of full restraints.

Although shackling a defendant in the presence of the jury should be avoided if possible, Brooks, 960 S.W.2d at 491, the court failed to consider any less drastic measures. Mr. Deck had worn leg braces at the first trial for both guilt and penalty phases, without incident (1st L.F.188). His good behavior at the first trial showed that he could be trusted without *additional* restraints at the penalty phase retrial.

Mr. Deck Was Prejudiced

Shackling is an inherently prejudicial practice. Holbrook, 475 U.S., at 568. After all, the sight of the shackled and handcuffed defendant can have a "significant effect" on the way the jury views the defendant. Illinois v. Allen, 397 U.S. at 344.

A capital sentencing must proceed with the utmost reliability, since the stakes are so high and so irreversible. Woodson v. North Carolina, 428 U.S. 280, 305 (1976). An integral part of the jury's determination of whether a defendant should be sentenced to death is the threat of danger he poses to his community. *See, e.g*., Simmons v. South Carolina, 512 U.S. 154, 162 (1994) ("defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system"). Shackling a defendant during the penalty phase drastically tilts the scales in favor of the state by creating the ever-present risk that the jurors will presume that the defendant is dangerous and therefore worthy of a death sentence. Commonwealth v. Chester, 587 A.2d 1367, 1378-79 (Pa. 1991).

The prejudice from shackling may be even greater at penalty phase than at the guilt-innocence phase, since the jury is assessing the defendant's dangerousness and risk of future violence and "might view the shackles as first hand evidence of future dangerousness and uncontrollable behavior which if unmanageable in the courtroom may also be unmanageable in prison, leaving death as a proper decision." Elledge, 823 F.2d at 1450. The issue to be decided at penalty phase – whether the defendant must be put to death – is as important as any issue determined at a regular criminal trial. The jury deciding Mr. Deck's ultimate fate should have made that decision without the prejudicial effect and "inherent disadvantages and limitations" of shackles, handcuffs and a belly chain. Illinois v. Allen, 397 U.S. at 344.

Although Mr. Deck was no longer presumed innocent of the crimes for which he was convicted, he was presumed innocent of any extraneous, unproven bad conduct or bad propensities which the shackles suggested. Presenting the defendant in shackles and handcuffs is like presenting evidence of the defendant's unadjudicated bad acts yet giving the defense no notice and no chance to confront or refute the evidence. State v. Debler, 856 S.W.2d 641, 657 (Mo.banc 1993); State v. Thompson, 985 S.W.2d 779, 792 (Mo.banc 1999). The restraints stripped Mr. Deck of the presumption that he was innocent of any misconduct until the state proved it beyond a reasonable doubt.

Trial courts are not allowed to comment on the evidence. In State v. Davis, 653 S.W.2d 167, 177 (Mo.banc 1983), this Court warned that trial courts "must maintain a position of absolute impartiality, avoid any conduct which might be construed as indicating a belief on the part of the judge as to the guilt of the defendant and the court should not demonstrate hostility toward the defendant." Yet the restraints conveyed a message from the court that it believed Mr. Deck to be a dangerous and untrustworthy man, who was hard to handle and required the utmost security. Through the shackles, handcuffs, and bellychain, the court communicated to the jury that Mr. Deck posed a high risk of future dangerousness.

Mr. Deck acknowledges that defense counsel asked the venirepanel if anyone would be affected by seeing him in handcuffs and shackles, and no one responded (Tr.165). But the Supreme Court has specifically recognized that jurors' responses in voir dire may not necessarily be dispositive of the prejudice

engendered by inherently prejudicial practices like shackling. Holbrook, 475 U.S., at 570. "If 'a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process,' little stock need be placed in jurors' claims to the contrary." *Id.*, *quoting* Estes v. Texas, 381 U.S. 532, 542-43 (1965). The Court reasoned that:

> Even though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused. This will be especially true when jurors are questioned at the very beginning of proceedings; at that point, they can only speculate on how they will feel after being exposed to a practice daily over the course of a long trial.

Holbrook, 475 U.S., at 570. The proper inquiry is "not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether "an unacceptable risk is presented of impermissible factors coming into play." *Id.*, *quoting* Estelle, 425 U.S. at 505. *See also* Hawkins v. Cockroft**,** 848 S.W.2d 622, 626 (Mo.App. 1993) ("A prospective juror is not the judge of his own qualifications"); State v. Jones, 384 S.W.2d 554, 558 (Mo.banc 1964) (decision of whether to strike a venireperson for cause should not depend "upon the conclusions of the juror whether he could or would divest himself of a prejudice he admitted to exist in his mind"). Restraining a defendant is so inherently prejudicial that, in Lovell v. State, 702 A.2d 261, 273-74 (Md. 1997), a new

penalty phase was warranted even though the court actually instructed the jurors to disregard the shackling and handcuffs.

Even in civil cases, the use of restraints causes prejudice warranting reversal. Civil commitment proceedings are analogous to penalty phase, since neither involves the question guilt or innocence, and both have a critical focus on whether the defendant is dangerous. In Tyars v. Finner**,** 709 F.2d 1274, 1285 (9th Cir. 1983), the federal court reversed Tyars' involuntary commitment, because "[t]he likelihood of prejudice inherent in exhibiting the subject of a civil commitment hearing to the jury while bound in physical restraints, when the critical question the jury must decide is whether the individual is dangerous to himself or others, is simply too great to be countenanced without at least some prior showing of necessity." The federal court held that, without a showing that the restraints were necessary or that less restrictive means could not have achieved the same purpose, the circumstances "deprive[d] the ... proceeding of the appearance of evenhanded justice which is at the core of due process." *Id*., *quoting* Mayberry v. Pennsylvania, 400 U.S. 455, 469 (1971) (Harlan, J., concurring).

So, too, in a civil rights action brought by a prison inmate, the inmate may not be forced to wear shackles unless there is extreme need. Lemons v. Skidmore**,** 985 F.2d 354, 357-58 (7th Cir. 1993). The federal court held:

> In a civil case, the plaintiff is still entitled to a fair trial in which the jury decides the case based on admissible evidence. The shackles suggest to the

> jury in a civil case that the plaintiff is a violent person. Since plaintiff's tendency towards violence was at issue in this case, shackles inevitably prejudiced the jury.

Id., at 357. Since it is prejudicial error to shackle and handcuff civil litigants, who face only loss of a lawsuit or involuntary commitment, it certainly must be prejudicial error to force a criminal defendant – facing the loss of his very life – to proceed with shackles, handcuffs and a belly chain without good cause.

Carman Deck was entitled to a carefully channeled and reliable sentencing. Mills v. Maryland, 486 U.S. 367, 383-84 (1988); McCleskey v. Kemp, 481 U.S. 279, 303-304 (1987); Gardner v. Florida, 430 U.S. 329, 358-59 (1977); Woodson, 428 U.S. at 305. Forcing him to appear throughout penalty phase in handcuffs, shackles, and a belly chain unnecessarily marked him as a dangerous and untrustworthy character, denied him the chance to confront that evidence, and destroyed any chance at reliable sentencing. The restraints – imposed without good cause, without consideration of less prejudicial alternatives, and over objection – deprived Mr. Deck of his rights to due process, equal protection, a fair and reliable sentencing, to confront the evidence against him, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10, 18 (a), and 21 of the Missouri Constitution. This Court must grant Carman Deck a new sentencing trial.

ARGUMENT III

The trial court plainly erred in submitting Instructions 7 and 8 regarding Count I, and 12 and 13 regarding Count III, because the instructions violated Carman Deck's rights to jury trial, presumption of innocence, proof beyond a reasonable doubt, due process, reliable sentencing, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10, 18(a) and 21 of the Missouri Constitution. The instructions failed to instruct the jury that the state bore the burden of proving beyond a reasonable doubt that, respectively, (1) the aggravating facts and circumstances warranted death, and (2) the evidence in mitigation was not sufficient to outweigh the evidence in aggravation. Because Mr. Deck was sentenced to death by a jury that was not instructed both that the state bore the burden of proof and that the burden of proof was beyond a reasonable doubt, for two of the three steps that were required to find that he was "death-eligible," he suffered manifest injustice and must receive a new penalty phase.

Section 565.030.4 provides in pertinent part:

> The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor…

(2) If the trier does not find that the evidence in aggravation of punishment, including but not limited to evidence supporting the statutory aggravating circumstances listed in subsection 2 of section 565.032, warrants imposing the death sentence; or

(3) If the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032, which is sufficient to outweigh the evidence in aggravation of punishment found by the trier….

In State v. Whitfield, 107 S.W.3d 253, 258-61 (Mo.banc 2003), this Court held that the findings required by §§565.030.4(1), (2), and (3) are death-eligibility factual findings that must be made by a jury. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it must be found by a jury beyond a reasonable doubt." *Id.*, 107 S.W.3d at 257, *citing* Ring v. Arizona, 536 U.S. 584, 602 (2002); *see also* Apprendi v. New Jersey, 530 U.S. 466, 483 (2000); Jones v. United States, 526 U.S. 227, 243 n.6 (1999). Moreover, the *state* bears the burden of proving, beyond a reasonable doubt, the existence of the facts required to prove a defendant eligible for death. Schlup v. Delo, 513 U.S. 298, 328 (1995); Bullington v. Missouri, 451 U.S. 430 (1981).

Despite this constitutional mandate, the instructions failed to include the requisite language. Instructions No. 7 and 12, addressing §565.030.4(2), failed to

instruct the jury that the state had the burden of proving beyond a reasonable doubt that the aggravating facts and circumstances warranted death provided:

> As to Count I, if you have unanimously found beyond a reasonable doubt that one or more of the statutory aggravating circumstance submitted in Instruction 6 exists, then you must decide whether there are facts and circumstances in aggravation of punishment which, taken as a whole, warrant the imposition of a sentence of death upon the defendant.
>
> In deciding this question, you may consider all of the evidence presented, including evidence presented in support of the statutory aggravating circumstances submitted in Instruction No. 6. If each juror finds facts and circumstances in aggravation of punishment that are sufficient to warrant a sentence of death, then you may consider imposing a sentence of death upon the defendant.
>
> If you do not unanimously find from the evidence that the facts and circumstances in aggravation of punishment warrant the imposition of death as defendant's punishment, you must return a verdict fixing his punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

(L.F. 217).[5]

[5] This excerpt is from Instruction 7. Instructions 7 (Count I) and 12 (Count II) are set forth in full in the Appendix.

So, too, Instructions 8 and 13, addressing §565.030.4(3), failed to instruct the jury that the state had the burden of proving beyond a reasonable doubt that the evidence in mitigation of punishment did not outweigh the evidence in aggravation of punishment:

> As to Count I, if you unanimously find that the facts and circumstances in aggravation of punishment, taken as a whole, warrant the imposition of a sentence of death upon the defendant, you must then determine whether there are facts or circumstances in mitigation of punishment that are sufficient to outweigh the facts and circumstances in aggravation of punishment. In deciding this question, you may consider all of the evidence presented.
>
> You shall also consider any facts or circumstances that you find from the evidence in mitigation of punishment.
>
> It is not necessary that all jurors agree upon particular facts and circumstances in mitigation of punishment. If each juror determines that there are facts or circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

(L.F. 218; *see also* L.F.224).[6]

[6] This excerpt is from Instruction 8. Instructions 8 (Count I) and 13 (Count II) are set forth in full in the Appendix.

Mr. Deck did not raise this issue at trial and therefore requests review for plain error under Rule 30.20. For instructional error to warrant reversal under plain error review, "the trial court must have so misdirected or failed to instruct the jury as to cause manifest injustice or miscarriage of justice." State v. Cline, 808 S.W.2d 822, 824 (Mo.banc 1991). Manifest injustice occurs when the instructional error appears to have affected the jury's verdict. State v. Hibler, 21 S.W.3d 87, 96 (Mo.App. 2000).

The United States Supreme Court has recognized that failure to correctly instruct the jury that the state's burden of proof is "beyond a reasonable doubt" is structural, per se, reversible error. Sullivan v. Louisiana, 508 U.S. 275, 281-82 (1993). But even under a manifest injustice standard, a new trial is warranted. While Instructions 7 and 8, 12 and 13 failed to direct the jury that it must apply the reasonable doubt standard and that the state bore the burden of proof with regard to steps two and three, the preceding instructions, No. 6 and 11, respectively, clearly set forth that, as to step one, in determining whether the aggravating circumstances existed, the burden of proof was on the state to prove the aggravating circumstances beyond a reasonable doubt:

> the burden rests upon the state to prove at least one of the foregoing circumstances beyond a reasonable doubt. On each circumstance that you find beyond a reasonable doubt, all twelve of you must agree as to the existence of that circumstance. Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing statutory

aggravating circumstances exist, you must return a verdict fixing the punishment of the defendant at imprisonment for life….

(L.F. 216,222). Instruction 3, as well, reiterated that as regards the first step (determination of whether an aggravating circumstance exists), the state bore the burden of proof beyond a reasonable doubt (L.F.213). By setting forth that the state bears the burden of proof beyond a reasonable doubt as to step one, but not steps two and three, Instruction 3 communicated to the jury that such a burden of proof did not apply to steps two and three (L.F.213). The jurors must have inferred from the stark absence of this language in the instructions regarding steps two and three that the burden of proof as to those steps was not beyond a reasonable doubt, and/or that the state did not carry the burden of proof. No instruction otherwise cures this defect. As a result, the trial court failed to instruct the jury in accordance with the substantive law. State v. Carson, 941 S.W.2d 518 (Mo.banc 1997).

The jury deliberated for six hours (Tr.563), and the evidence in mitigation was strong. A substantial risk exists that the death sentences resulted from the jurors' incorrect belief that steps two and three were met if Mr. Deck did not prove otherwise, or if the state met those burdens only by a preponderance of the evidence. The death sentences are not reliable and hence cannot stand. Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

By shifting the burden of proof, or lessening the state's burden of proof,

Instructions 7 and 8, 12 and 13 likely caused the jurors to misapply the law in a way that violated Mr. Deck's rights. State v. Erwin, 848 S.W.2d 476, 483 (Mo.banc 1993). Mr. Deck was denied his rights to jury trial, presumption of innocence, proof beyond a reasonable doubt, due process, reliable sentencing, and freedom from cruel and unusual punishment. U.S.Const., Amends.V,VI,VIII, XIV; Mo.Const., Art. I, §§10,18(a),21. His death sentences must be vacated, and he must be resentenced to life imprisonment.

ARGUMENT IV

The trial court plainly erred in failing to read Instruction 2, based on MAI-CR3d 302.02; and repeatedly failed to read the cautionary instruction based on MAI-CR3d 300.04 and then refused to question the jurors once this failure was discovered. The court's failures created a manifest injustice to Carman Deck, in violation of his right to due process, a fair and reliable sentencing, and to be free from cruel and unusual punishment, as guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 21 of the Missouri Constitution. Mr. Deck suffered manifest injustice by the court's failure to read MAI-CR3d 302.02 prior to opening statements, because the instruction was necessary for the jury to understand – as it heard opening statements, the evidence, and closing arguments – what it could consider as evidence and what it must completely disregard, and without the instruction at the proper time, the entire structure of the trial was flawed. Mr. Deck suffered manifest injustice by the court's repeated failure to read the cautionary instruction, and his refusal to question the jury about what they may have heard or discussed, because the jury likely was affected by outside influences or formed premature opinions of the evidence.

The trial court failed to provide Carman Deck with a fair and reliable capital sentencing procedure by failing to instruct the jury on the most basic and

necessary concepts essential to a fair trial. The trial court failed to read the preliminary instruction based on MAI-CR3d 302.02 which tells the jury what can be considered as evidence and what must not. The court also repeatedly failed to read the cautionary instruction based on MAI-CR3d 300.04, which reminds the jurors not to read or listen to any information about the case or talk about the case amongst themselves. The failure to read these required instructions denied Mr. Deck his rights to due process, a fair and reliable sentencing, and to be free from cruel and unusual punishment. U.S. Const. Amends.V,VIII,XIV; Mo. Const. Art. I, Secs. 10,21.

"Whenever there is an MAI-CR instruction applicable under the law..., the MAI-CR instruction is to be given to the exclusion of any other instruction." State v. Ervin, 979 S.W.2d 149,158 (Mo.banc 1998). Error results when the trial court fails to give a mandatory instruction. State v. Gilmore, 797 S.W.2d 802,805 (Mo.App. 1990). The prejudicial effect of such an error must be judicially determined. State v. Storey, 901 S.W.2d 886,892 (Mo.banc 1995); Rule 28.02(f). The errors are presumed to prejudice the defendant unless it is clearly established by the state that the error did not result in prejudice. State v. White, 622 S.W.2d 939,943 (Mo.banc 1981).

Because defense counsel did not timely object to the court's failures to read the instructions, Mr. Deck requests plain error review. Rule 30.20; State v. Wurtzberger, 40 S.W.3d 893,898 (Mo.banc 2001) (plain error review is permitted even when counsel fails to object to the instructions pursuant to Rule 28.03). For

instructional error to warrant reversal under plain error review, "the trial court must have so misdirected or failed to instruct the jury as to cause manifest injustice or miscarriage of justice." State v. Cline, 808 S.W.2d 822, 824 (Mo.banc 1991). Manifest injustice occurs when the instructional error appears to have affected the jury's verdict. State v. Hibler, 21 S.W.3d 87, 96 (Mo.App. 2000).

Court's Failure to Read Instruction No. 2

Before opening statements, the court read the instructions modeled after MAI-Cr3d 300.06, 302.01, 313.30A, 313.31 and 313.32 (Tr.263). Noticeably absent was the instruction modeled after MAI-CR3d 302.02, which would have been as follows:

> You must not assume as true any fact solely because it is included in or suggested by a question asked a witness. A question is not evidence, and may be considered only as it supplies meaning to the answer.
>
> From time to time the attorneys may make objections. They have a right to do so and are only doing their duty as they see it. You should draw no inference from the fact that an objection has been made.
>
> If the Court sustains an objection to a question, you will disregard the entire question and you should not speculate as to what the answer of the witness might have been. The same applies to exhibits offered but excluded from the evidence after an objection has been sustained. You will also

disregard any answer or other matter which the Court directs you not to consider and anything which the Court orders stricken from the record.

The opening statements of attorneys are not evidence. Also, you must not consider as evidence any statement or remark or argument by any of the attorneys addressed to another attorney or to the Court. However, the attorneys may enter into agreements or stipulations of fact. These agreements and stipulations become part of the evidence and are to be considered by you as such.

(L.F.212). Since the instruction is not to be re-read at the conclusion of the evidence, it was never read to the jury. *See* MAI-CR3d 302.02, note 2. The instruction was provided to the jury in writing during deliberations, as Instruction No. 2 (L.F.212).

This Court has held that the trial court's failure to give MAI-CR2d 2.02 – the precursor to MAI-CR3d 302.02 – was presumptively prejudicial, warranting reversal. Crystal Tire Company v. Home Service Oil Co., 525 S.W.2d 317, 322 (Mo.banc 1975); Brannaker v. Transamerican Freight Lines, Inc., 428 S.W.2d 524, 537 (Mo.1968); Murphy v. Land, 420 S.W.2d 505, 507 (Mo. 1967); State v. Clifton, 549 S.W.2d 891, 893 (Mo.App. 1977) (reversal warranted by court's refusal to read other required preliminary instruction). "Although MAI 2.02 is cautionary in nature, its use in every case is mandatory and a failure to give it cannot be excused on the ground that counsel did not call its omission to the attention of the court before the jury was instructed." Brannaker, 428 S.W.2d at

537. Finding reversible error, this Court stressed, "It is clear that MAI 2.02 is deemed to be an integral part of a complete set of instructions under the system of approved jury instructions." *Id*.

Even omitting language from the preliminary instructions, or providing additional explanation to the instructions, has compelled reversal. State v. Cross, 594 S.W.2d 609, 609-10 (Mo.banc 1980); Brown v. St. Louis Public Service Co., 421 S.W.2d 255, 259 (Mo.banc 1967); State v. Behrman, 613 S.W.2d 666, 667 (Mo.App. 1981). In Cross, this Court reversed a murder conviction based on the trial court's attempt, after reading the preliminary instructions, to then explain them to the jury. 594 S.W.2d at 609-10. The instructions "have no place for departures such as took place in the present case." *Id*., at 610. The Court demanded that trial courts abide by the MAI-CR instructions in starting jury trials. *Id*.

The trial court's error in failing to read the instruction was a structural defect that undermines confidence in the outcome of the sentencing trial. A structural defect affects "the framework within which the trial proceeds, rather than [being] simply an error in the trial process itself." Arizona v. Fulminante, 499 U.S. 279, 307-10 (1991); State v. Storey, 986 S.W.2d 462, 464 (Mo.banc 1999). It differs from mere trial error, whose effects can be quantitatively assessed. Fulminante, 499 U.S. at 307-308.

Failure to read MAI-CR3d 302.02 affected the framework of the trial itself. Its effects cannot be quantitatively assessed, because without the instruction, the

court never established a line between evidence that could and should have been considered by the jury, and the speculation, presumptions, and improper allegations that should not have been considered. Without the instruction, the jurors would have no reason but to consider as evidence facts that were merely included in or suggested by a question asked a witness; to draw inferences from the fact that an attorney objected to certain evidence; to consider as evidence questions and/or the answers to questions even though the court sustained an objection to the question; to consider as evidence what the court had stricken from the record; and to consider as evidence the opening statements, closing arguments, or comments made by the attorneys or the court.

The problem was not cured by the fact that the instruction was given to the jury in written form as they started deliberating (L.F.212). The court never read the instruction to the jury, and there is no way of knowing whether the jurors read the instruction themselves. Even if the jurors had read the instruction, though, it was too late at that point. Being allowed to read the instructions in deliberations gave the jury no guidance when they needed it – as the evidence came in. The instruction must be given before opening statement so that the jury will disregard improper testimony or arguments immediately and not make improper inferences or presumptions. But by the time the jury entered the deliberation room, the presumptions, inferences, and improper testimony were already part of the body of "evidence" the jury considered in making its decision that Mr. Deck should die.

Events occurred throughout the trial that the jury may have improperly considered, given the lack of instruction. From opening statement, the jury may have improperly considered as substantive evidence that Tonia Cummings told her boyfriend that she and Mr. Deck would be engaging in a "robbery, burglary and possible murder" and that Mr. Deck would have a "military type pistol" in his car (Tr.265-66).[7] Later in opening statement, the court sustained defense counsel's objection that the state was discussing irrelevant and inadmissible evidence, but the jury may have believed that the state was not to proceed with its discussion but that it could consider the facts already stated (Tr.276).

During the trial, the attorneys asked to approach the bench numerous times (Tr.302,317,324,329,339,355,402,408,417). The jurors may have speculated or made inferences about the subject of those bench conferences and wondered what defense counsel was trying to hide. When the court sustained defense counsel's objection that a lay witness was giving improper expert testimony, the jury may well have considered the witness' response (Tr.334). When the court sustained defense counsel's objection to the admission of autopsy photographs, the jury may have improperly considered as evidence that defense counsel was trying to hide facts from the jury (Tr.363).

[7] These "facts" are hearsay and should have been excluded from evidence. *See* Argument I, *supra*.

The death sentences are not fair to either Mr. Deck or the jury, because the jury was never given the proper instruction on what it could consider as evidence. The reading of MAI-CR3d 302.02 before opening statements was crucial, because it would have given the jury the basic parameters of what it could consider as evidence, and it would have kept the jurors from considering improper facts and presumptions in their deliberations. Instead, the death verdicts were attained by allowing the jury to consider inferences, speculation, presumptions, and inadmissible evidence. The verdicts are unreliable and cannot stand.

Repeated Failure to Read the Cautionary Instruction

MAI CR-3d 300.04(1) requires the court to give a cautionary instruction to the jury after the first recess or adjournment. At each subsequent recess, the court must instruct the jurors as follows:

> The Court again reminds you of what you were told at the first recess of the Court. Until you retire to consider your verdict, you must not discuss this case among yourselves or with others, or permit anyone to discuss it in your hearing. You should not form or express any opinion about the case until it is finally given to you to decide. (Do not read, view, or listen to any newspaper, radio, or television report of the trial.)

MAI-CR3d 300.04(2).

On the first day of the three-day trial, the court properly instructed the venirepanel prior to the first recess (Tr.140). But when the court divided the panel into small groups for death qualification, the court failed to instruct the first three

of the four panels in accordance with MAI-CR3d 300.04 when each panel returned to the larger group (Tr.199, 215, 241). The court also failed to instruct the jurors at the end of the proceedings on the first day, at the end of the proceedings on the second day, and after both parties had rested (Tr.262,422,532-33).

At the start of the final, third day of proceedings, defense counsel advised the court that it had not read the cautionary instruction before the jury recessed the night before (Tr.425). Defense counsel advised the court that the St. Louis Post-Dispatch was in newspaper boxes all over town with a large headline regarding the reversal of the Amrine death sentence (Tr.425).[8] The court could not recall whether the instruction was read or not (Tr.425). Defense counsel requested a mistrial or in the alternative, asked that each of the jurors be questioned individually to determine if they had talked to anyone or heard anything improper (Tr.425-26). The court denied the requests (Tr.426).

Carman Deck suffered manifest injustice by the court's repeated failure to caution the jurors not to talk about the case amongst themselves or to read about the case. The court failed to read the instruction to each of the first three panels after conducting small group voir dire (Tr.199, 215, 241), and those venirepersons made up the jury that decided Mr. Deck's fate (Tr.261; L.F.195-97). The court failed to caution the jury three more times, including twice at the adjournment of

[8] This Court issued its opinion in State ex rel. Amrine v. Roper**,** 102 S.W.3d 541 (Mo.banc 2003) on the second day of the three-day trial.

the proceedings each day, when the jurors would have had more opportunity to chat or would be more open to outside influences (Tr.262,422,532-33).

The court's failure to read the cautionary instruction has been found not to be error when defense counsel had the chance to question the jurors about the problem, State v. Feltrop**,** 803 S.W.2d 1, 8 (Mo.banc 1991), State v. Cable, 4 S.W.3d 571, 574 (Mo.App. 1999); or where the only remedy sought by the defendant was a mistrial (rather than questioning the jurors), State v. Barajas, 930 S.W.2d 74, 75 (Mo.App. 1996); or where nothing in the record indicates that anything during the recess could have prejudiced the defendant, State v. White, 880 S.W.2d 624, 625 (Mo.App. 1994).

Here, the court denied defense counsel's request to question the jurors about any outside influences they may have encountered, or if they had talked about the case amongst themselves (Tr.425-26). The court's justification was merely that he did not see any need for it (Tr.426). Counsel advised the court that there was a heightened concern, since the headlines of the newspaper placed in newspaper stands all over town was the reversal of the death sentence in another well-known death case (Tr.425-26). If the jurors had seen even the headline, it could have aroused feelings that criminal defendants have too many chances or that, even if the jury gave Mr. Deck death, it would be overturned on appeal, thereby improperly lessening the jury's sense of responsibility. Caldwell v. Mississippi, 472 U.S. 320, 342 (1985).

The court's failure to read Instruction No.2 prior to opening statements and its repeated failure to read the cautionary instruction resulted in death verdicts that are inherently unreliable. Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Failure to read the instructions created too great a risk that extraneous, improper facts or presumptions invaded the jury's deliberations. This Court must grant Mr. Deck a new sentencing trial.

ARGUMENT V

The trial court abused its discretion and plainly erred in letting the State present victim impact testimony that far exceeded its proper scope – a family tree containing people who were not born, had already died, or were not yet married into the family by the time of the victims' death; a three-page emotionally-charged narrative; and hearsay testimony that the victims' granddaughter was worried and scared about coming to court. The excessive victim impact testimony violated Carman Deck's rights to due process, fair trial, reliable sentencing, and freedom from cruel and unusual punishment, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), 19, and 21 of the Missouri Constitution. The victim impact testimony far exceeded that which is authorized by §565.030.4 and Payne v. Tennessee, and its overwhelmingly emotional nature resulted in death verdicts based on emotion rather than rational thought.

"It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977). Thus, in State v. Taylor, 944 S.W.2d 925, 938 (Mo.banc 1997), this Court held that it was reversible error for the state to urge the jury to "get mad" and decide the case based on emotion. It is just as impermissible to allow the jury to become so

overwhelmed with emotionally-charged victim impact evidence that reason is abandoned in favor of emotion.

That is exactly what happened here. The court allowed the state to far exceed the permissible range of victim impact evidence. First, it allowed the state, over objection, to introduce into evidence the victims' family tree, spanning four generations and including people who had died, had not yet been born, or had not yet become part of the family by the time of the Longs' deaths (Tr.411). Second, the court allowed the state, over objection, to present a lengthy, emotionally-charged narrative that contained impermissible comments and failed to follow the rules of evidence (Tr.418-21). Finally, the court allowed the state to elicit a hearsay statement regarding the fear and anxiety of one of the Longs' granddaughters of coming to court (Tr.399). The hearsay statement implied that it was Mr. Deck's fault that the girl was facing such anguish and that it should punish him for exercising his right to a sentencing trial; and that there must be some reason for the girl to fear coming to court, such as a fear that Mr. Deck may try to hurt someone or escape.

In Payne v. Tennessee, 501 U.S. 808, 826-29 (1991), the Supreme Court held that the Eighth Amendment does not erect a *per se* bar against admission of victim impact evidence and prosecutorial argument on that subject.[9] But although

[9] Section 565.030.4 allows the state to present "evidence concerning the murder victim and the impact of the crime upon the family of the victim and others."

Payne permits the admission of evidence and argument regarding the victim's personal characteristics and the crime's impact on the victim's family, it does not permit the unconditional admission of evidence and argument on this topic. *Id*., at 825-27, 830,n.2. The Supreme Court recognized that, "[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Id*.

The Victims' Family Tree

State's Exhibit 81 was the victims' family tree (Tr.410). Defense counsel objected to its admission, arguing that the family tree didn't truly show how the victims' deaths affected the family (Tr.373, 384-85). Some of the children listed on the family tree weren't even born until after the murders, and the family tree also listed a son who had predeceased the victims in 1977 (Tr.373, 384-85,411). Defense counsel argued that victim impact testimony is not supposed to be a lengthy chronology of the victims' progeny, of "who beget who beget who" (Tr.373). The court overruled the objection (Tr.385,411). The issue is included in the motion for new trial (Supp.L.F.12).

The family tree was admitted through the testimony of the Longs' son, William (Tr.411). He explained that the family tree started with James and Zelma Long and proceeded to their seven children, then the grandchildren, and then the great-grandchildren (Tr.410). It also listed the spouses (Tr.410). Mr. Long mentioned each of the forty plus people on the family tree (Tr.411-15).

The family tree was excessive victim impact evidence, because it was not strictly relevant to the effect of the victims' deaths on the family. Mr. Long and two of his sisters had already testified that the family was large and closely-knit, and that the deaths of their parents had left a big hole (Tr.390-91,401,416-18). The family tree did nothing to further that point. Although it listed everyone in the extended family, it did not show how each of the people listed were affected by the deaths, which is the precise point of victim impact testimony. Included on the family tree was someone who had predeceased the victims (Tr.411), and a spouse of one of the children who apparently was no longer in the family due to divorce or death (Tr.414). These people would not be affected by the deaths of the victims, yet were included nonetheless.

The Supreme Court of Tennessee has recognized that "evidence regarding the emotional impact of the murder on the victim's family should be most closely scrutinized because it poses the greatest threat to due process and risk of undue prejudice." State v. Nesbit**,** 978 S.W.2d 872, 891 (Tenn. 1998). Thus, that court held that "victim impact evidence should be limited to information designed to show those unique characteristics which provide a brief glimpse into the life of the individual who has been killed, the contemporaneous and prospective circumstances surrounding the individual's death, and how those circumstances financially, emotionally, psychologically or physically impacted upon members of the victim's immediate family." *Id; see also* Hanson v. State**,** 72 P.3d 40, 54-55 (Okla.Crim.App.,2003) (reversing due to excessive victim impact testimony after

victim's niece testified as to effect of victim's death on extended family and the community); State v. Josephs, 803 A.2d 1074, 1121 (N.J. 2002) (setting forth structure of victim impact testimony and urging that testimony must be factual and "free of inflammatory comments or references").

This Court must impose limitations on the state's use of victim impact testimony. The family tree was allowed even though it extended to people who were dead, not yet born, or not otherwise part of the family at the time of the victims' deaths (Ex.81). This is clearly beyond the scope of victim impact evidence anticipated by Payne or authorized by Section 565.030.4.

Narrative Statement

Defense counsel objected to state witness William Long reading a written narrative statement as part of his testimony (Tr.386). The state responded that the narrative was geared to ensure that Mr. Long did not state anything objectionable (Tr.386). The court overruled the objection (Tr.386). The issue is included in the motion for new trial (Supp.L.F.12-13).

In his testimony, Mr. Long discussed how his parents' deaths had affected him and the rest of the family (Tr.417-18). He then read a three-page narrative, discussing things he and his siblings had done with their parents; things that reminded him of his parents; things that he missed with his parents gone; how his parents' friends are affected by the deaths; and how his family has been affected overall (Tr.418-21). He commented on how senseless the deaths were (Tr.421).

This Court has warned that victim impact evidence may only be presented "consistent with the normal rules of evidence, meaning that traditional evidentiary rules … apply with equal force in a capital sentencing proceeding." State v. Knese**,** 985 S.W.2d 759, 772 (Mo.banc 1999). The rules of evidence apply, specifically, to victim impact statements. *See, e.g.*, Walls v State, 986 S.W.2d 397, 399 (Ark. 1999).

The state should not have been allowed to elicit a narrative statement from its witness. Victim impact witnesses must abide by the same rules of evidence as any other witness. If the state was worried that its witness may stray into objectionable territory, it was the state's duty to prepare the witness and to pose its questions very carefully. Certainly, the defense was not allowed to elicit narrative testimony from its witnesses regarding mitigating evidence; when that started to happen, the state objected and defense counsel was instructed to rephrase his question (Tr.497).

Allowing the narrative enabled the state to enhance the already emotionally-laden victim impact testimony even further. Instead of following the format of question and answer, Mr. Long was able to give a lengthy, emotional soliloquy.

The narrative did not even fulfill its purpose asserted by the state – to prevent the witness from making impermissible comments. This still occurred. For example, Mr. Long was allowed to communicate his feeling of how senseless the crimes were (Tr.421). This directly contradicted the trial court's order

precluding testimony regarding family members' characterization of the crimes (L.F.156-58). "Admission of a victim's family members' characterizations and opinions about the appropriate sentence are inadmissible." Taylor, 944 S.W.2d at 938; *see also* Booth v. Maryland, 482 U.S. 496 (1987)(overruled on other grounds).

Both the state and the defense must be subject to the same rules. After all, Payne derived from the Supreme Court's belief that the playing field had tipped too far in favor of capital defendants. 501 U.S. at 822. Ironically, now the field has tipped too far in the other direction. The state cannot be allowed to present the most emotionally-charged testimony without abiding by basic rules of procedure and evidence. Since the rules shifted depending on who took the stand, the trial was manifestly unfair and the death sentences cannot stand.

Granddaughter's Fear of Coming to the Court Proceedings

The state elicited from the Longs' youngest daughter, Laura Friedman, that her daughter told her she was "very anxious about [coming to court] and very worried and concerned, scared" (Tr.399).[10]

Victim impact testimony must be limited to the victim's personal characteristics and the crime's impact on the victim's family. Payne, 501 U.S., at

[10] Defense counsel did not object to this testimony, so Carman requests that the Court review this issue for plain error. Rule 30.20.

825-27, 830,n.2. Instead, the state sought to extend the victim impact testimony to the impact of Mr. Deck's sentencing trial on the victims' extended family. Clearly, Mr. Deck has the right to have his sentence decided by the jury, and he should not be penalized for asserting that right. The sentencer may not "use the sentencing process to punish a defendant, guilt notwithstanding, for exercising his or her right to receive full and fair trial." Vickers v. State, 17 S.W.3d 632, 634 (Mo.App. 2000); *see also* United States v. Jackson, 390 U.S.570, 581-83 (1968).

Testimony about the girl's fear of coming to court also left the jury to speculate as to the basis for the girl's fear and anxiety about coming to the court proceeding. It invited the jury to make inferences not supported by the evidence. The testimony raised the specter that Mr. Deck had threatened the victims' family members, or that he was so dangerous that he may try to escape or hurt someone in the courtroom. The unexplained sight of Mr. Deck throughout the proceedings, in shackles, handcuffs and bellychain (*see* Argument II, *supra*), heightened the possibility that the jurors used the girl's hearsay statement to assume that he was so dangerous that a little girl feared even seeing him in the courtroom.

Although the State is entitled to show that the victim was something other than a "faceless stranger," State v. Gray, 887 S.W.2d 369,389 (Mo.banc 1994), the state's victim impact testimony went far beyond. The goal of penalty phase, after all, is to gauge the moral culpability of the defendant, not to swamp the jury with emotionally-laden evidence that blurs the jury's responsibility of imposing sentence based on reason and common sense. Allowing the State to abuse the use

of victim impact evidence violated Carman Deck's rights to due process, fair trial, reliable sentencing, and freedom from cruel and unusual punishment, in violation the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), 19, and 21 of the Missouri Constitution. This Court must vacate the death sentences and grant Mr. Deck a new sentencing trial.

ARGUMENT VI

The trial court abused its discretion by letting the State, over objection, personalize its closing argument by urging the jurors to relive the victims' ten minutes of terror as they lay on their stomachs begging for their lives while Mr. Deck stood with a gun in his hand. The state's improper argument deprived Mr. Deck of his rights to due process, a trial before a fair and impartial jury, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution. The trial court's approval of the improper argument prejudiced Mr. Deck and affected the outcome of the trial by allowing fear and anger to replace reason in the jury's deliberations.

Closing arguments in capital cases must receive a "greater degree of scrutiny" than those in non-capital cases. Caldwell v. Mississippi, 105 S.Ct.2633, 2639 (1985). They are "particularly important in capital cases, where there are unique threats to life and liberty." State v. Barton, 936 S.W.2d 781,783 (Mo.banc 1996).

The state engaged in improper personalization when it urged the jurors to sit for ten minutes and relive the victims' "ten minutes of terror":

> When you go back to the jury room, pick your foreperson, look at the instructions and you start talking about it. At some point would you stop and

> just sit there silently for ten minutes? Think about the evidence, [t]hink about Carman Deck with the gun in his hand, James and Zelma lying on the bed. Ten minutes doesn't seem long. See how long that is just when you're sitting in the jury room. Think about them on their stomachs begging for their lives for ten minutes.

(Tr.559). Defense counsel objected to the personalization, but the court overruled it (Tr.559). The state continued, "To see how long ten minutes of terror would be" (Tr.559). The issue is included in the motion for new trial (Supp.L.F.15).

Asking the jury to relive the victims' "ten minutes of terror" was designed solely to arouse personal animosity toward Mr. Deck and attain verdicts based on fear and anger rather than reason. This Court has held that "inflammatory arguments are always improper if they do not in any way help the jury to make a reasoned and deliberate decision to impose the death penalty." State v. Rhodes, 988 S.W.2d 521, 528 (Mo.banc 1999), *citing* State v. Taylor, 944 S.W.2d 925, 937 (Mo.banc 1997). Asking the jurors to place themselves in the shoes of the victims is improper personalization that "can only arouse fear in the jury." State v. Storey, 901 S.W.2d 886, 901 (Mo.banc 1995).

In Storey, 901 S.W.2d at 901 (Mo.banc 1995), the state urged the jurors to imagine having their heads yanked back by the hair and feel a knife severing their throats. *Id*. This Court held that the argument was grossly improper, and its prejudice was "undeniable." *Id*.

So, too, in Rhodes, 988 S.W.2d 521, 528 (Mo.banc 1999), the state suggested that the jurors in deliberating act out what the victim went through when she was killed. It urged each juror to feel what its like to be beaten on the floor, with her hands tied behind her back and her nose broken, and to have her head pulled back so hard that its snaps her neck. *Id*. The prosecutor acted out the scene as he spoke. *Id*. This Court recognized that the state's argument was "condemned and uniformly branded improper" since a juror placing herself in the victim's shoes "would be no fairer judge of the case than the … victim herself." *Id*., *citing* Faught v. Washam, 329 S.W.2d 588, 602 (Mo.1959). The argument, "designed to cause the jury to abandon reason in favor of passion" was improper and warranted a new sentencing trial. Rhodes, 988 S.W.2d at 528-29.

Although trial courts have wide discretion in controlling closing arguments, they abuse that discretion when they allow argument that is plainly unwarranted and that has a decisive effect on the jury. State v. Newlon, 627 S.W.2d 606, 616 (Mo.banc 1982). The trial court abused its discretion, because the argument had no purpose but to arouse personal fear and anger toward Mr. Deck. The state had made virtually the same argument at the first trial, telling the jury that when they were deliberating, they should "count out ten minutes and you think about how long that is and then think about somebody pointing a gun at your head at the same time" (1st Tr.948). No objection was made, and this Court reviewed it for plain error and found none. State v. Deck, 994 S.W.2d 527, 544 (Mo.banc 1999).

The issue is now fully preserved for review. Knowing that its argument crossed the line, although not amounting to plain error, the state repeated it again here, only with more graphic detail. Here, the court overruled defense counsel's objection, thereby effectively giving the argument its stamp of approval. Taylor, 944 S.W.2d at 938; Barton, 936 S.W.2d at 788. The jurors were left with the incorrect belief that it was okay for them to allow fear and anger to replace a reasoned, deliberate decision. The argument deprived Carman Deck of his rights to due process, a trial before a fair and impartial jury, and to be free from cruel and unusual punishment. U.S.Const., Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21. This Court must remand this matter for a new sentencing trial.

ARGUMENT VII

The trial court abused its discretion in overruling Carman Deck's objections and sustaining the state's motions to strike Venirepersons Richard Overmann and Michael Schaeffer and for cause, in violation of Mr. Deck's rights to due process, fundamental fairness, trial by a fair, impartial and fairly selected jury, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10,18(a), and 21 of the Missouri Constitution. Mr. Overmann expressed a problem with the death penalty and his preference for a sentence of life without parole, but indicated that he would stay open-minded, listen to the evidence, and follow the court's instructions. Mr. Schaeffer merely indicated that he would be uncomfortable at the prospect of imposing a death sentence and stated that he did not know if he would be able to, although he would like to think he could do it. The erroneous exclusion of two jurors requires that Mr. Deck's death sentences be vacated and he be re-sentenced to life imprisonment without probation or parole or, alternatively, that the cause be remanded for a new penalty phase trial.

"Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution." Witherspoon v. Illinois, 391 U.S. 510, 523 (1968). The trial court, however, created a "hanging" jury by sustaining the state's strikes for cause of

Venirepersons Richard Overmann and Michael Schaeffer. While Mr. Overmann expressed discomfort with the death penalty and a preference for a sentence of life without parole, he stated that he would stay open-minded, listen to the evidence, and follow the court's instructions (Tr.220-21,237-38). Mr. Schaeffer expressed his discomfort and his fear that he might not be able to follow the instructions, but he also stated that he would like to think he could serve as a juror (Tr.219,234-36).

A prospective juror may be excluded for cause based on his views on capital punishment only when the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instruction and his oath." Wainwright v. Witt, 469 U.S. 412, 424 (1985). It is only the "juror who in no case would vote for capital punishment, regardless of his or her instructions" who must be removed for cause. Morgan v. Illinois, 504 U.S. 719, 728 (1992).

The Supreme Court has recognized that "[a] man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him … and can thus obey the oath he takes as a juror." Witherspoon, 391 U.S. at 519. "[T]o exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law." Adams v. Texas, 448 U.S. 38, 50 (1980).

When the state wishes to exclude a prospective juror for cause because of her views on the death penalty, it must question that juror to make a record of the

bias. Gray v. Mississippi, 481 U.S. 648, 652 n.3 (1987). The state's motion to excuse "must be supported by specified causes or reasons that demonstrate that, as a matter of law, the venire member is not qualified to serve." *Id*. "The burden of proving bias rests on the party seeking to excuse the venire member for cause." Witt, 469 U.S. at 423; Lockhart v. McCree, 476 U.S. 162, 170 n. 7 (1986).

Although the trial court has broad discretion in determining the qualifications of a prospective juror, the trial court's ruling should be disturbed on appeal when it is clearly against the evidence and constitutes a clear abuse of discretion. State v. Rousan, 961 S.W.2d 831, 839 (Mo.banc 1998). The trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. State v. Brown, 998 S.W.2d 531, 540 (Mo.banc 1999).

Here, the prosecutor asked if everyone in the venire panel could consider the full range of punishment, whether it be life imprisonment without the possibility of parole or the death penalty (Tr.216). Venirepersons Michael Schaeffer and Richard Overmann nodded yes (Tr.216-17). But both men raised their hands when asked if anyone would be unable to vote for the death penalty no matter what the evidence was (Tr.217).

Richard Overmann

Mr. Overmann stated that he has a problem with the death penalty (Tr.220). Initially, he stated that he would have trouble following the court's instructions in

considering the death penalty and trouble taking an oath to follow the instructions because one of the possible penalties was death (Tr.220-21). He has a preconceived notion that life without parole would be the way to go (Tr.221).

But despite his uneasiness with the death penalty, Mr. Overmann also stated that he would be able to stay open-minded, listen to the evidence, and follow the court's instructions (Tr.238). Defense counsel asked Mr. Overmann if he had a problem with the death penalty in any first-degree murder case or in this case specifically (Tr.237). Mr. Overmann responded:

> I'd probably have a problem. I have a basic belief, you know, that taking – if they're removed from society, that they're no threat to nobody any more, so why take their life. So that's why I would have a problem with it. I could go through the instructions and the evidence. I would have a problem going that far. I don't think I can go any farther than just – I cannot go for the death penalty, that it would have to be life without parole.

(Tr.237). When asked if he was unable to consider the death penalty, Mr. Overmann responded, "It'd be hard for me. I would have to listen to it. I can stay open-minded, but I definitely – it would be hard for me" (Tr.238). He responded, affirmatively to counsel's question whether he would be able to sit on the jury and stay open-minded and listen to all the evidence and follow the instructions (Tr.238).

Over objection, the court granted the state's motion to strike Mr. Overmann, reasoning that he stated that he could not follow the instructions and

was vacillating enough to cause concern (Tr.242-43). The issue is included in the motion for new trial (Supp.L.F.8).

Mr. Overmann expressed his belief that imposing a death sentence would be very hard. Certainly, the decision to sentence a person to die should be a difficult decision for anyone. But Mr. Overmann also stated that he although he'd have a problem imposing death, "I could go through the instructions and the evidence" (Tr.237). He would listen to the evidence and would keep an open mind although it would be hard (Tr.238). He would follow the court's instructions (Tr.238).

Mr. Overmann fits within the category of jurors who are eligible to serve on a capital jury even though they have scruples against the death penalty. A juror may not be struck for cause based on his distaste for the death penalty unless his view "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Witt, 469 U.S. at 420, *quoting* Adams, 448 U.S. at 45. "[T]hose who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." Lockhart, 476 U.S. at 176.

Despite his discomfort with the death penalty, Mr. Overmann stated that he could keep an open mind, listen to the evidence and follow the court's instructions (Tr.220-21,237-38). The trial court abused its discretion in sustaining the state's motion to strike him for cause.

Michael Schaeffer

Mr. Schaeffer stated that he was very uneasy – he would like to think he could do his job but just did not know (Tr.218). Mr. Schaeffer stated that he might not be able to follow the instructions and would "hate to swear an oath to it" (Tr.219). He would try to do his job, "but in the right conscience I just don't think I could" (Tr.219). He was uncomfortable with the death penalty, and the possibility of sentencing Mr. Deck to death made him uncomfortable (Tr.234-35). He has never seriously discussed the death penalty before and didn't know if he could make the decision (Tr.235). When asked if he could follow the instructions, Mr. Schaeffer stated that he did not know (Tr.236). "The more I hear and think about it, it's gonna be hard for me if I would actually sit on this jury and base that decision. If I ever do this again I honestly wouldn't want to…. I certainly would like to believe I could do my job, but until, you know, I actually have to face that part, whether I could, you know, I don't know" (Tr.236-37).

The state moved to strike Mr. Schaeffer for cause because he indicated he couldn't follow the instructions, follow his oath, or consider giving the death penalty (Tr.241-42). Over objection, the court sustained the motion to strike over objection (Tr.242). The issue is included in the motion for new trial (Supp.L.F.8).

In essence, Mr. Schaeffer stated that he did not know whether he could sentence a man to die. He apparently realized the awesome responsibility that would be placed upon him in a juror – the responsibility of deciding whether Mr. Deck should live or die.

The Supreme Court held that a venireperson's inability "positively to state whether or not their deliberations would in any way be affected" by the prospect of the death penalty was a constitutionally insufficient ground for exclusion for cause. Adams, 448 U.S. at 50. A potential juror's nervousness, emotional involvement, or inability to deny or confirm that he could be affected by the prospect of imposing the death penalty does not equate to an unwillingness or an inability to follow the court's instructions and obey his oath regardless of his personal feelings about the death penalty. *Id*. A venireperson need not commit to imposing death before hearing the facts of the case:

> [A] prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings.

Witherspoon, 391 U.S. at 522 n. 21.

As in Adams, there was insufficient ground to strike Mr. Schaeffer for cause, merely because he could not positively state that he would not be affected by the fact that the jury would be considering whether Mr. Deck should die. Mr. Schaeffer stated that he would hope that he could perform his job as a juror. He was unable to commit that he would in fact be able to impose a death sentence, but

at that point he did not have all the facts before him. He did not state that he was irrevocably set against the death penalty.

"The decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death." Witherspoon, 391 U.S. at 521, fn.20. Striking Venirepersons Schaeffer and Overmann for cause improperly stacked the deck in favor of death and violated Mr. Deck's rights to due process, a fair and impartial jury, and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§10,18(a), 21. Because the erroneous exclusion of even one potential juror based on her views on the death penalty is reversible constitutional error, Gray, 481 U.S. at 657-58, 662-68, the death sentences cannot stand. Mr. Deck must be re-sentenced to life imprisonment without probation or parole or, alternatively, this cause must be remanded for a new penalty phase trial.

ARGUMENT VIII

The trial court erred in accepting the jury's death penalty verdicts and in sentencing Carman Deck to death, in violation of his rights to due process of law, fundamental fairness, reliable, proportionate sentencing, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, and Section 565.035.3(3). Pursuant to its independent duty to review death sentences under Section 565.035, this Court should reduce the death sentences to life imprisonment without parole, based on the wealth of mitigation evidence presented, the facts of the crime, and events at trial that resulted in verdicts based on hearsay, inferences, speculation, and emotion. This Court must engage in meaningful proportionality review by considering all similar cases. If it did, it would conclude that Mr. Deck's death sentences are excessive and disproportionate.

Section 565.035 allows this Court to set a death sentence aside when it believes that (1) the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors; (2) the evidence does not support the aggravating factors; or (3) the sentence is disproportionate to the sentences imposed in similar cases, considering the crime, the strength of the evidence, and the defendant. Despite the fact that Carman Deck was sentenced to death, the

strength of the evidence in mitigation, the facts of the crime, and events at trial do not warrant the death penalty. This Court must utilize its power under Section 565.035 to set aside the unwarranted death sentences.

Mr. Deck Presented a Wealth of Evidence in Mitigation

Throughout his childhood and teen years, Mr. Deck experienced neglect, abandonment, abuse, and humiliation as a daily part of life. His experiences during those many difficult years adversely affected the rest of his life (Tr.480,501-504).

As a baby, Mr. Deck was denied the most basic needs – food and affection (Tr.468,484-85). At one point, he needed to be hospitalized because he had been deprived of food and liquids too long (Tr.484). He was often left alone while his mother went out to "party" (Tr.467,484,486). Mr. Deck "always wanted to hug" other relatives, something he never got from his mother (Tr.501). His father, too, preferred to remain estranged from his child (Tr.484). He would leave money that was supposed to be for Mr. Deck, but never made the effort to ensure that the money actually went to feed or clothe him (Tr.485).

Mr. Deck was physically abused from a young age. As an example, when he was two or three, his mother whipped him hard enough to raise welts for just playing and making too much noise (Tr.497,512). Afterwards, she forced him to sit in a corner for hours, and if he so much as whimpered, she cursed and screamed at him (Tr.497,512).

Starting around age five – typically the most carefree time in a child's life –

Mr. Deck was forced to take on the role of mother for his baby brother and two sisters, one of whom was mentally retarded (Tr.485-86,498; M.D.Depo.8). He would scavenge whatever food he could, sometimes only a stick of butter or dry dog food (Tr.487,506). He would clothe and clean his brother and sisters (Tr.487-88). The only help Mr. Deck got was from a mentally retarded uncle who sometimes was left to watch over them (Tr.468,485,507).

The children were so neglected that they were, literally, almost starving to death. When Mr. Deck was about nine, a child welfare agency picked up the children, who had been left alone, hungry, and filthy (Tr.461,468-69,490). They were taken to their uncle's house, where the children were able to eat their fill (Tr.455,461,490; M.D.Depo.9-10). Mr. Deck's brother Michael was so hungry that he wolfed down his food, threw it up, and then tried to re-eat it (Tr.456,469, 490;M.D.Depo.9-10).

When Mr. Deck was around twelve or thirteen, he lived with his father and his step-mother, an abusive and very severe alcoholic (Tr.493). She didn't like Mr. Deck or the other children, whom she considered "extra baggage" and would feed them only cold hotdogs (M.D.Depo.13-14). She would abuse the children by making them kneel on broomsticks and would slap them, spank them, or pull their hair (M.D.Depo.13-14).

Mr. Deck's stepmother was especially malicious toward him (Tr.493). One time, after he had had an accidental bowel movement in his pants, his stepmother smeared the feces all over his face until only his eyes were showing (Tr.472,494;

M.D.Depo.12-13). She made him stay like that while the feces caked and dried, and took a photograph of him (Tr.494). Meanwhile, she verbally abused him, telling him telling him how embarrassed he should be of himself and saying that she would tell everyone what he had done (Tr.470,494). The woman was so dysfunctional that she did in fact show the photograph to other people, apparently without a shred of shame for what she had done to the young boy (Tr.470,472).

Mr. Deck's childhood had no structure and no stability. He and the other children were moved from relative to relative. His father shipped the children away at the stepmother's request, letting the children know that he would choose a severe alcoholic who had so cruelly abused them, over his own children (M.D.Depo.14). Mr. Deck's mother, too, would take up with men at the drop of the hat, have sex with them in the children's presence (Tr.488), or simply abandon the children to be with a man for days on end (Tr.461,468-69,490). When Mr. Deck finally would find structure and loving support – in foster homes – his mother would pull him away, take him for a while, and then abandon him again (Tr.491).

Mr. Deck craved a loving home and found one at the foster home of Reverend Major Puckett (Tr.495,526,528,530-31). He did well there and fit in "just like he was born there" (Tr.495,528). Reverend Puckett described Mr. Deck as a very likable boy who never argued and always did his chores (Tr.495,526, 528). Mr. Deck treated his blind foster mother like she was his own mother:

> He would read the instructions off the cans to her [when she'd go to cook] and help her in the kitchen and he just tried to take all the work off of her that he could. He was like a son to her.

(Tr.529). Reverend Puckett didn't "ever remember him crossing me in any way, shape or form, not one time" (Tr.531). Mr. Deck was only there a year before his mother pulled him away again (Tr.496). Reverend Puckett had wanted to adopt Mr. Deck but was not allowed (Tr.495,530).

When Mr. Deck was out of prison, he spent "quality time" with his young niece, Michael's daughter Amber (M.D.Depo.17). For a good year of Amber's first years of life, Mr. Deck was always buying her things, taking her places, and generally treating her "like a princess" (M.D.Depo.17). Mr. Deck lived across the street from Michael and Amber and was very accessible (M.D.Depo.22). Michael loves his brother and always will and has visited him in prison (M.D.Depo.17,26-27).

The Facts of the Crime Don't Warrant Death

Mr. Deck confessed and gave a full, candid and accurate account of the events (Ex.69). This Court has recognized that confessing and cooperating with the police can be grounds for granting proportionality relief. State v. McIlvoy, 629 S.W.2d 333 (Mo.1982) (telephoning police 3 days after crime, turning himself in, and waiting for police to arrive were factors in favor of proportionality relief).

Mr. Deck did not go to the house planning to kill the Longs (Ex.69). He went to the house only to rob them, using the gun to force them to hand over the

contents of the safe (Ex.69). Once the robbery was underway, however, Mr. Deck realized that because the Longs had seen him, they could identify him (Tr.69). For ten minutes, he stood at the foot of their bed wondering what to do (Tr.442; Ex.69). He "was nervous [and] didn't know what to do. I knew they'd already seen me and if I walked out of there and let them lay there I was in trouble anyway" (Ex.69). He simply did not know what to do (Ex.69). He was scared and nervous (Tr.450;Ex.69). Mr. Deck was forced into action when Ms. Cummings ran in and shouted that they needed to leave (Ex.69). He was left "standing in there not knowing what to do, knowing that they already seen me. If I left I was going to go to jail. If I shot them I was going to jail. And just, uh, nervousness and sacredness. I just shot them" (Ex.69;Tr.442). Mr. Deck was not a cold-blooded killer who went to the house with a design to rob and kill – he was a robber who placed himself in a bad situation and then, under pressure, made an abysmal decision.

Improper Events at Trial Skewed the Verdicts

The Eighth Amendment exacts a heightened need for reliability in the determination that death is the appropriate punishment in a specific case. Caldwell v. Mississippi, 472 U.S. 320,340 (1985); Woodson v. North Carolina, 420 U.S. 280,305 (1976). That reliability is absent here.

Throughout the proceedings, the state repeatedly strayed outside the evidence. To enhance Mr. Deck's culpability, the state elicited blatant hearsay to show that Mr. Deck planned to kill the victims before he even left his sister's

house (Tr.281-82). The hearsay elevated Mr. Deck from a haphazard robber who had not thought things out well (Ex.69), to a cold-blooded killer who committed the robbery knowing full well he could not leave the victims alive (Tr.281-82). The hearsay testimony improperly struck at the heart of Mr. Deck's character and culpability, the key considerations in penalty phase. Enmund v. Florida, 458 U.S. 782, 801 (1982); Tison v. Arizona, 481 U.S. 137, 149 (1987); Lockett v. Ohio, 438 U.S. 586, 605 (1978).

The court also forced Mr. Deck to proceed through the entire three-day trial marked as a dangerous and untrustworthy man, forced to wear shackles, handcuffs and a belly chain (Tr.74). The state had not shown any cause, much less good cause, for the full restraints, which the Supreme Court has repeatedly decried as "inherently prejudicial." Holbrook v. Flynn, 475 U.S. 560, 568-69 (1986); see also Illinois v. Allen, 397 U.S. 337, 344 (1970); Estelle v. Williams, 425 U.S. 501, 503-504 (1976). The full restraints were especially prejudicial in penalty phase, where the jury would decide whether Mr. Deck would be sentenced to death or life imprisonment based, at least in part, upon their belief that he would be dangerous in prison or at risk to escape.

The court failed to give the jury the most basic instructions, which would have guided the jury on which evidence was proper for its consideration and which it should absolutely not consider (Tr.199, 215, 241,262-63,422,532-33; L.F.212). The court's instructions also failed to advise the jury that the state had the burden of proof beyond a reasonable doubt for all three of the steps that would

make Mr. Deck death-eligible (L.F.217-18, 223-24). The failure meant that the jury likely placed the burden of proof on Mr. Deck, or that the jury did not require the state to meet its burden beyond a reasonable doubt.

Through its victim impact evidence and closing arguments, the state urged the jury to abandon reason in favor of fear and anger toward the defendant. In closing argument, the state urged the jury to relive the victims' "ten minutes of terror" (Tr.559). The argument, "designed to cause the jury to abandon reason in favor of passion" was improper and warrants relief. State v. Rhodes, 988 S.W.2d 521, 528 (Mo.banc 1999). The state also relied on excessively emotional victim impact testimony, such as the admission of the victims' family tree, the reading of a three-page narrative, and hearsay testimony that the victims' granddaughter suffered fear and anxiety by the court proceedings (Ex.81; Tr.399,411,418-421).

This Court Must Perform Meaningful Proportionality Review

This Court's proportionality review, as it is currently conducted, is fatally flawed. Its definition of "similar cases" includes only those cases in which death was imposed, not all factually similar cases. State v. Gray, 887 S.W.2d 369, 389 (Mo.banc 1994). As a result, its analysis is skewed toward finding proportionality. Harris v. Blodgett, 853 F.Supp.1239, 1287-88 (W.D.Wash.1994).

De novo review is appropriate in death cases. In Cooper Industries v. Leatherman Tool Group Inc., 532 U.S. 424, 436 (2001), the Supreme Court held that appellate courts should apply *de novo* review to awards of punitive damages. Appellate courts should consider: (1) the degree of the defendant's

reprehensibility or culpability; (2) the relationship between the penalty and the harm to the victim caused by the defendant's actions; and (3) the sanctions imposed in other cases for comparable misconduct. *Id*., at 435.

The Supreme Court justified *de novo* review of these awards based on the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishment, which is applicable to the States under the due process clause of the Fourteenth Amendment. *Id*., at 433-34. The Court found that a jury's award of punitive damages is analogous to cases "involving deprivations of life," where a jury has found that death is an appropriate sentence. *Id*., at 434. *De novo* review "helps to assure the uniform treatment of similarly situated persons that is the essence of law itself." *Id*., at 436; *see also* BMW of North America, Inc. v. Gore, 517 U.S. 559, 584 (1996); Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415 (1994).

Certainly, if this type of independent review is warranted in cases where only money is at stake, it must also apply when a human life is at stake. Unlike pecuniary awards, the loss of a human life cannot be reversed. *See* State v. Black, 50 S.W.3d 778, 793-99 (Mo.banc 2001)(Wolfe, J., dissenting). In capital cases, the Fourteenth and Eighth Amendments require comparative proportionality review that will consider similar cases with "similar" determined by the facts of the case – regardless of sentence – including but not limited to the circumstances of the crime, the defendant, the mitigating evidence, and the aggravating evidence. *See* Atkins v. Virginia, 536 U.S. 304 (2002) (Court did not look at whether a particular sentence was "proportionate" with regard to "a particular crime or

category of crime" but instead considered whether the death sentence was excessive with regard to a particular defendant).

This Court must "compare[e] each death sentence with the sentences imposed on similarly situated defendants to insure that the sentence of death in a particular case is not disproportionate" and ensure a "meaningful basis [exists] for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." Gregg v. Georgia, 428 U.S. 153, 198 (1978); Section 565.035.3(3).

If the Court does so, it would conclude that Mr. Deck's sentences are disproportionate, since Missouri courts have sentenced similarly situated defendants to life imprisonment. Barry Holcomb beat and strangled his girlfriend, killing her and her six-month-old fetus, resulting in two sentences of life without parole. State v. Holcomb, 956 S.W.2d 286 (Mo.App. 1997). Ann Marie Dulany and Ronald Conn were convicted of two counts of capital murder after they robbed an elderly couple, beat the wife to death, and beat the husband, before setting both on fire. State v. Dulany, 781 S.W.2d52 (Mo.banc 1989); Conn v. State, 769 S.W.2d 822 (Mo.App. 1989). Emery Futo bludgeoned to death his mother, then shot and stabbed his father, and shot his two brothers. State v. Futo, 932 S.W.2d 808,811-12 (Mo.App. 1996). *See also* State v. Clark**,** 859 S.W.2d 782 (Mo.App. 1993) (two counts of first degree murder; victims shot during robbery); State v. Merrill, 990 S.W.2d 166 (Mo.App. 1999) (double homicide committed before 4-year-old girl; one victim was her father); Salazar v. State, 978 S.W.2d

479 (Mo.App. 1998) (convicted by jury of two counts of first-degree murder). Each of these cases resulted in life sentences. This Court should exercise its independent power of review to do more than merely rubber-stamp the trial court's actions.

Upholding a death sentence under these circumstances violates the Eighth Amendment's requirement of heightened scrutiny of a capital sentence. Caldwell, 472 U.S. at 329. It also violates Mr. Deck's rights to due process and to be free from cruel and unusual punishment, as guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 21 of the Missouri Constitution. This Court must set aside the death sentences previously imposed upon Carman Deck and resentence him to life imprisonment without the possibility of parole.

ARGUMENT IX

The trial court lacked jurisdiction and authority to sentence Carman Deck to death because the state never charged him with the only offense punishable by death in Missouri – *aggravated* first degree murder. The state failed to plead in the indictment those facts, required by Section 565.030.4(1), (2), and (3), that the jury must find beyond a reasonable doubt before a defendant may be sentenced to death. Furthermore, Mr. Deck was charged with the lesser offense of *unaggravated* first degree murder, not punishable by death and, as a result, his death sentence violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article 1, §§ 10, 17, 18(a), and 21 of the Missouri Constitution.

In Apprendi v. New Jersey, 530 U.S. 466, 469, 484 (2000), the U.S. Supreme Court recognized that due process and other jury protections extend to determinations regarding the length of sentence. Relying on Jones v. United States, 526 U.S. 227 (1997), the Court held that the Fifth, Sixth, and Fourteenth Amendments demand that any fact, other than prior conviction, that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. Apprendi, 530 U.S. at 476, 490. It deemed unconstitutional any statute that "remove[s] from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Id*. The key inquiry is whether "the required finding

expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict." *Id*., at 494.

The Supreme Court's opinions suggest that aggravating facts that must be found by a jury beyond a reasonable doubt are elements of a greater offense. In Sattazahn v. Pennsylvania, 537 U.S. 101, 111 (2003), the Court held that "the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances': Whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death." In Harris v. United States, 536 U.S. 545, 564 (2002), the Court stressed, "[p]ut simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense." In Ring v. Arizona, 536 U.S. 584, 609 (2002), the Court held that because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense," the Sixth Amendment requires that they be found by a jury.

Missouri has expressly provided by statute that life imprisonment without the possibility of probation or parole (LWOP) is the maximum sentence that may be imposed for first-degree murder unless the jury finds that the state has proven certain facts beyond a reasonable doubt. Section 565.030.4(1),(2),(3); State v. Whitfield, 107 S.W.3d 253, 258-61 (Mo.banc 2003).

To make the defendant "death-eligible," the state (1) must plead and prove at least one statutory aggravating circumstance; (2) must prove that evidence in

aggravation warrants imposition of a death sentence; and (3) must prove that the evidence in aggravation outweighs the evidence in mitigation. Section 565.030.4(1),(2),(3); Whitfield, 107 S.W.3d at 258-61.

Thus, while the "form" of Missouri's statutory scheme, and §565.020 appear to create only one crime – first-degree murder punishable by either LWOP or death – the "effect" of the statute is quite different. In reality, there exist in Missouri both the offense of "unaggravated" first-degree murder, for which the only authorized punishment is LWOP; and the offense of "aggravated" first-degree murder, for which the authorized punishments include both LWOP and death. To reach the offense of "aggravated" first-degree murder, the State must prove at least one aggravating circumstance.

Under Ring, Whitfield, and prior decisions of this Court, these additional facts are, in function and effect, elements of the greater offense of aggravated first-degree murder. For that reason, to pass constitutional muster, these facts must be pled in the charging document. *See, e.g.*, Whitfield, *supra;* State v. Taylor, 18 S.W.3d 366, 378 n.18 (Mo.banc 2000) ("once a jury finds one aggravating circumstance, it may impose the death penalty"); State v. Shaw, 636 S.W.2d 667, 675 (Mo.banc 1982), *quoting* State v. Bolder, 635 S.W.2d 673, 683 (Mo.banc 1982) ("The jury's finding that one or more statutory aggravating circumstances exist is the threshold requirement that must be met before the jury can, after considering all the evidence, recommend the death sentence"). If the state does not prove an aggravating circumstance beyond a reasonable doubt, the offense

remains "unaggravated" first-degree murder and the punishment is limited to LWOP.

As elements of the greater offense of capital or *aggravated* murder, aggravating circumstances should be pled in the document charging capital or aggravated murder. "An indictment must set forth each element of the crime that it charges." Almendarez-Torres v. United States, 523 U.S. 224, 228 (1998). "It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process." *See, e.g.*, Jackson v. Virginia, 443 U.S. 307, 314 (1979) *citing* Cole v. Arkansas, 333 U.S. 196, 201 (1948); Presnell v. Georgia, 439 U.S. 14 (1978).

"[A] person cannot be convicted of a crime with which the person was not charged unless it is a lesser included offense of a charged offense." State v. Parkhurst**,** 845 S.W.2d 31, 35 (Mo.banc 1992). "The indictment or information must actually charge that a crime has been committed." State v. Stringer, 36 S.W.3d 821, 822 (Mo.App. 2001).

This Court's opinion in State v. Nolan, 418 S.W.2d 51 (Mo. 1967) is instructive. In Nolan, the defendant was charged with first-degree robbery. Although the robbery statute authorized an enhanced or additional punishment of ten years' imprisonment 'for the aggravating fact for such robbery being committed "by means of a dangerous and deadly weapon,"' the amended information failed to charge this aggravating fact. *Id.*, at 52.

The state argued that the defendant was notified "of the cause and the

nature of the offense for which he was convicted." *Id.*, at 53. The state's two-fold argument was a) it was obvious from "the words used in the information" that the offense involved the use of a weapon, and b) the defendant's motion to vacate his sentence indicated he was aware during voir dire that the state intended to try the case as an aggravated robbery and the defendant never objected. *Id*., at 53-54.

Rejecting the state's arguments, this Court held, "The charge 'with force and arms' does not include the allegation that the robbery was committed by means of a dangerous and deadly weapon." *Id.*, at 54. "The sentence here, being based upon a finding of the jury of an aggravated fact not charged in the information, is illegal" and "[t]he trial court was without power or jurisdiction to impose that sentence." *Id.*

The Due Process Clause of the Fourteenth Amendment affords no less protection to defendants charged with murder than to those accused of robbery. If aggravating circumstances must be alleged in a robbery indictment to charge the aggravated form of robbery and to subject the defendant to an enhanced punishment, then the Due Process Clause requires that aggravating circumstances must be alleged in the document charging first-degree murder to subject a defendant to the enhanced punishment of death.

The amended information did not "charge" any facts to support the state's later allegation that Mr. Deck committed "aggravated" or "capital" first-degree murder (L.F. 61-63). Instead, the state charged Mr. Deck with the lesser offense of *unaggravated* first degree murder. As a result, Mr. Deck may only be

convicted of the lesser offense actually charged.

Mr. Deck raised this issue during trial (Tr.426) and included it in the motion for new trial (Supp.L.F.16). He acknowledges that this Court has previously rejected similar claims, *e.g.*, State v. Edwards, 116 S.W.3d 511, 543-44 (Mo.banc 2003). In light of Whitfield, however, he respectfully requests that the Court consider its prior holdings.

The state must prove at least one aggravating circumstance to bump the maximum sentence for first-degree murder from LWOP to death. Section 565.030.4(1). By failing to allege in the information how the first-degree murder charge was "aggravated" to make the crime capital murder, the sentence could be no more than that for "unaggravated" first-degree murder: LWOP. The trial court had jurisdiction over Mr. Deck and the charge of *unaggravated* first-degree murder – an offense punishable only by life imprisonment without probation or parole, but the trial court exceeded its jurisdiction and authority in sentencing Mr. Deck to death. The death sentence violated Mr. Deck's rights to jury trial, due process, freedom from cruel and unusual punishment, and reliable sentencing. U.S. Const., Amends.V,VI,VIII,XIV; Mo.Const., Art I,§§10,17,18(a),21. The death sentences must be reversed, and Mr. Deck must be resentenced to life imprisonment.

CONCLUSION

Based on Arguments I, II, IV, V, and VI, Carman Deck respectfully requests that the Court vacate his death sentences and remand for a new sentencing trial. Based on Argument VII, Mr. Deck requests that his death sentences be vacated and he be resentenced to life imprisonment without probation or parole or, alternatively, that the cause be remanded for a new penalty phase trial. Based on Arguments III, VIII, and IX, Mr. Deck respectfully requests that this Court vacate his death sentences and order that he be resentenced to life imprisonment without parole.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing were delivered to: The Office of the Attorney General, P. O. Box 899, Jefferson City, Missouri 65102; on the 23rd day of January, 2004.

_____
Rosemary E. Percival

Certificate of Compliance

I, Rosemary E. Percival, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains 29,377 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a copy of this brief. The disk has been scanned for viruses using a McAfee VirusScan program. According to that program, the disk is virus-free.

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